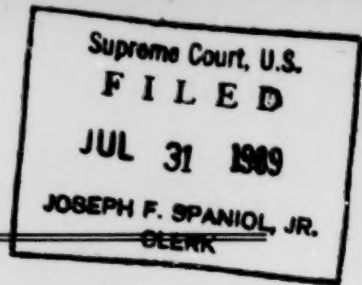


89-187

No. 89-



In The  
**Supreme Court of the United States**  
October Term, 1989

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JACK McCORMICK,  
Warden of the Montana State Prison, and  
MARC RACICOT,  
Attorney General of the State of Montana,  
*Petitioners,*  
v.

DEWEY E. COLEMAN,  
*Respondent.*

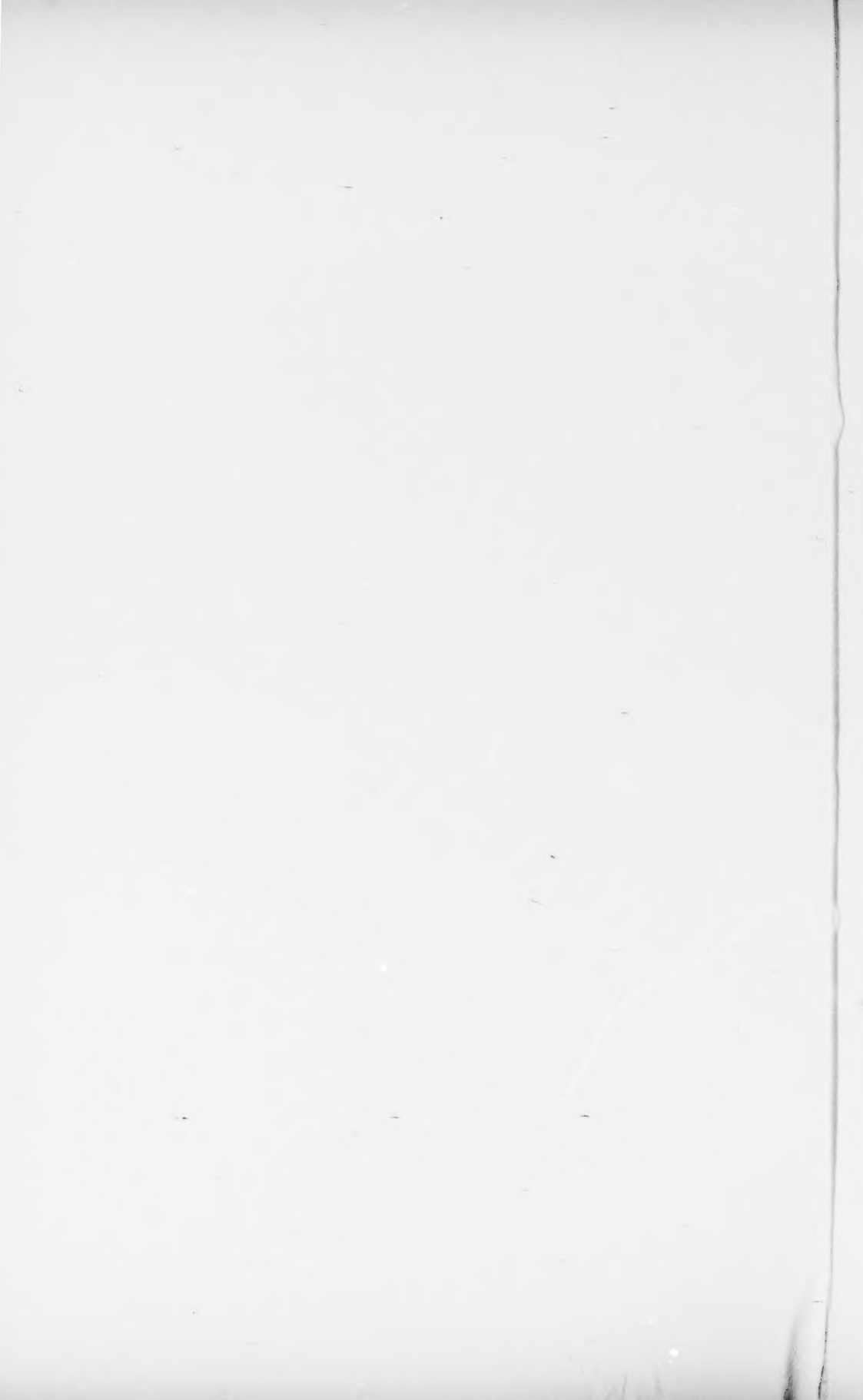
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**PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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## QUESTIONS PRESENTED

1. Does the Due Process Clause bar the retroactive application of a constitutional capital sentencing scheme upon resentencing of a criminal defendant whose trial occurred when a mandatory death penalty was in effect, even though such retroactive application is permitted by the *Ex Post Facto* Clause?

2. May a novel due process theory be applied on collateral review to overturn a death sentence which was final in 1979?

3. Does harmless error analysis apply to a due process violation arising from the retroactive application of capital sentencing procedures; and, if the error may not be deemed harmless, what is the appropriate remedy?

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---

Petitioners Jack McCormick, warden of the Montana State Prison, and Marc Racicot,<sup>1</sup> Attorney General of the State of Montana, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on May 5, 1989.

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<sup>1</sup> Marc Racicot is the successor in office to Mike Greely, a named party in the proceedings below.

## OPINIONS BELOW

The opinion of the Court of Appeals limited *en banc* panel, reported at 874 F.2d 1280 (9th Cir. 1989), is annexed as Appendix A. The withdrawn opinion of the three-judge panel of the Court of Appeals is reported *sub nom. Coleman v. Risley*, 839 F.2d 434 (9th Cir. 1988), and is annexed as Appendix B. The opinion of the United States District Court for the District of Montana, which is unreported, is annexed as Appendix C.

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## JURISDICTION

The judgment of the Court of Appeals was entered on May 5, 1989. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

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## RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The Fourteenth Amendment to the United States Constitution, in pertinent part:

[N]or shall any State deprive any person of life, liberty, or property without due process of law . . . .

2. Article 1, section 10, clause 1 of the United States Constitution, in pertinent part:

No State shall . . . pass any . . . ex post facto Law . . . .

3. Revised Codes of Montana, 1947, section 95-2206.6 to 95-2206.15 (1977) (now codified as Mont.



Code Ann. §§ 46-18-301 to 310), the full text of which appears in Appendix A at App. 23-28.

4. Revised Codes of Montana, 1947, section 94-5-304 (repealed in 1977):

A court shall impose the sentence of death following conviction of aggravated kidnapping if it finds that the victim is dead as a result of the criminal conduct.

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## STATEMENT OF THE CASE

### I. Statement of the Facts.

A complete statement of the facts of the underlying offenses appears in the panel opinion of the Court of Appeals at App. 75-83. On July 4, 1974, Peggy Lee Harstad, twenty-one years old, was abducted by two hitchhikers whom she had stopped to aid. Almost two months later, her body was found on the north bank of the Yellowstone River, west of Forsyth, Montana. The investigation of her disappearance and the discovery of evidence led to the arrest of Robert Dennis Nank and Dewey Eugene Coleman, who had admitted hitchhiking together in the area of Harstad's disappearance on the evening thereof. Coleman and Nank were charged with deliberate homicide, aggravated kidnapping, and sexual intercourse without consent. On May 7, 1975, Nank entered into a written plea agreement with the State, pursuant to which he entered a plea of guilty to deliberate homicide and solicitation to commit sexual intercourse, and agreed to testify against Coleman in return for the dismissal of the aggravated kidnapping charge, which carried a mandatory death sentence pursuant to the Revised Codes of

Montana 1947, § 94-5-304 (1974). For various reasons irrelevant to the issues herein, the State did not accept Coleman's plea offer.

At Coleman's trial, Nank testified that he and Coleman were traveling together by motorcycle when they ran out of gas between Roundup and Forsyth on the evening of July 4, 1974, and they decided to hitchhike. Peggy Harstad stopped and both men got into the car. Nank stated that he took control of the vehicle and forced Harstad into the back of the car where he attempted sexual intercourse. When Nank failed in his attempt, Coleman then forced Harstad to participate in sexual intercourse with him. Subsequently, they drove to the Yellowstone River, where Nank carried Harstad over his shoulder while Coleman came from behind and struck Harstad several times over the head with his silver motorcycle helmet. Coleman then tried to strangle her with a rope. Both men then carried her to the river. Coleman went into the river and tried to drown her. When Harstad attempted to get up, Nank went into the river to participate. Coleman held her legs and Nank held her head under the water until she drowned.

Coleman testified that Nank had hitchhiked alone while Coleman waited by the motorcycle; that when Nank returned with a car he was wet, upset and acting strange; and that Nank said he had killed a girl. Coleman testified that Nank gave him a purse and some other items and instructed him to hide them. Coleman's fingerprint was found on a piece of paper in the victim's purse. Coleman had offered three differing stories when questioned by the authorities about his whereabouts and activities on July 4, 1974.

In the course of cross-examination of Nank, Coleman's counsel pursued a line of questioning pertaining to other offenses committed by Nank. Nank testified that he and Coleman stole some rifles from a house near Roundup, Montana, on the day of Harstad's murder, and that the rifles were now in the possession of the Rosebud County Sheriff. Nank's complete testimony on the burglary is annexed as Appendix D. Coleman denied committing the burglary, first stating he was with Nank all the time in Roundup, and then stating that Nank left him for about an hour or two. Appendix E.

## II. Prior Court Proceedings.

On November 14, 1975, the jury convicted Coleman of deliberate homicide, sexual intercourse without consent, and aggravated kidnapping. On November 21, 1975, the state district court sentenced Coleman to 100 years' imprisonment for the deliberate homicide, to 40 years (later reduced to 20 years) for the sexual intercourse without consent, and to death for the aggravated kidnapping. On appeal to the Montana Supreme Court, the convictions were upheld, but the case was remanded for resentencing. The Montana Supreme Court held unconstitutional Rev. Codes Mont. 1947, § 94-5-304 (1974) (repealed in 1977), providing for a mandatory death penalty for aggravated kidnapping resulting in the death of the victim. *State v. Coleman*, 177 Mont. 1, 15-16, 579 P.2d 732, 741-42 (1978) (*Coleman I*).

On remand to the state district court in 1978, Coleman was resentenced to death following a hearing on aggravating and mitigating circumstances pursuant to

Rev. Codes Mont. 1947, § 95-2206.6 to 95-2206.15 (1977), App. 23-29. The court's Findings, Conclusions, Judgment and Order of July 10, 1978, is annexed as Appendix F. The state trial court ruled that the application to Coleman of the greater procedural protections of the new sentencing statutes did not violate the *ex post facto* clause. App. 327. The court found that Coleman had no criminal record, but that he had participated in a burglary on the day of the murder. App. 329-30. Further, the state trial court concluded that an aggravating circumstance existed, that none of the mitigating circumstances were sufficiently substantial to call for leniency, and that "the only mitigating circumstance technically present in this cause is that the defendant has no record history of prior criminal activity." App. 331-32. On automatic review, the Montana Supreme Court upheld the convictions and sentences. *State v. Coleman*, 185 Mont. 299, 605 P.2d 1000 (1979) (*Coleman II*), cert. denied, 446 U.S. 970 (1980). Rejecting Coleman's *ex post facto* argument, the court found that the 1977 amendments were procedural in nature, that no substantial right or immunity possessed by Coleman at the time of the offense had been taken away, and that the amendments eased the rigor of the law as it existed at the time of the offense. *State v. Coleman*, 185 Mont. at 312-24, 605 P.2d at 1010-15. Coleman did not specifically argue that the retroactive application of the 1977 sentencing statutes denied him due process by virtue of the fact that evidence of the burglary became relevant to sentencing, or that he would have changed his trial strategy.

Coleman sought further relief in the Montana Supreme Court Sentence Review Division, but the petition was refused. *Coleman v. Sentencing Review Division of*

*Supreme Court of Montana*, 449 U.S. 893 (1980) (vacating stay of execution of death sentence and denying certiorari). Thereafter, Coleman filed a petition with the state district court for post-conviction relief, the denial of which was affirmed in *Coleman v. State*, 633 P.2d 624 (1981), *cert. denied*, 455 U.S. 983 (1982). Here, Coleman raised a due process claim in conjunction with the consideration by the sentencing judge of the Roundup burglary.

On November 19, 1981, Coleman filed his petition for a writ of habeas corpus in the United States District Court pursuant to 28 U.S.C. § 2254. On May 11, 1982, the proceedings were stayed to allow Coleman to exhaust an unrelated issue in the state courts. *Coleman v. Risley*, 663 P.2d 1154 (Mont. 1983) (*Coleman IV*). Coleman's federal habeas corpus action then proceeded with oral argument on cross-motions for summary judgment. On August 8, 1985, the district court granted the State's motion for summary judgment and denied Coleman's motions for an evidentiary hearing and for summary judgment. Appendix C. While the petition raised a due process challenge to the consideration of the burglary evidence in sentencing, Amended Pet., Claim 19, CR 36 at 54, the district court did not specifically rule on that issue. The district court found: "Considering the brutality of the crime, it was not error for the trial judge to decide that the defendant's lack of a criminal record was not sufficiently substantial to call for leniency." App. 305. The district court further determined that the retroactive application of the 1977 statutes did not violate the *ex post facto* clause due to the significantly greater safeguards in the new statutes. App. 310-12.

Coleman lodged an appeal with the Ninth Circuit Court of Appeals on October 23, 1985. Coleman claimed, *inter alia*, that he had been denied his due process right to notice that the sentencing court intended to use uncorroborated testimony concerning the Roundup burglary as evidence at sentencing to deprive him of mitigation credit for his prior clean record. Appellant's Brief at 34-37. In his *ex post facto* argument, he asserted that in developing his trial strategy his counsel had relied on the sentencing statute as it then existed, and that he would not have cross-examined Nank regarding the burglary had he known it would later be used in sentencing. Appellant's Brief at 43-44. The three-judge panel which first considered the cause affirmed the district court judgment denying habeas corpus relief. Appendix B. The panel rejected Coleman's due process argument, reasoning that Coleman had received adequate notice that the burglary evidence would be used at sentencing. App. 127-32. The panel further held that even if Coleman were disadvantaged in this aspect of trial strategy, this Court's opinion in *Dobbert v. Florida*, 432 U.S. 282 (1977), dictated the rejection of Coleman's *ex post facto* claim. App. 86-94.

In his dissent, Judge Reinhardt argued that the retroactive application of the new sentencing scheme violated due process in that Coleman's counsel had relied upon the old statute in determining trial strategy. App. 265-75. The Court of Appeals then granted Coleman's petition for rehearing *en banc* (Order, May 12, 1988), and ordered supplemental briefing on certain enumerated questions, including whether the retroactive application of the 1977 sentencing statutes could violate due process by reason of possible changes in trial strategy. Order, May 26, 1988.



Following reargument, the Court of Appeals filed its *en banc* opinion, withdrawing the panel opinion. Appendix A. Declining to decide all other issues with the exception of a jury selection question, the Court of Appeals reversed Coleman's death sentence on the ground that he was denied due process by the retroactive application of the 1977 sentencing statutes. Sidestepping the established rule under *ex post facto* jurisprudence that a procedural change which may work to the disadvantage of the defendant is not a constitutional violation, the Court of Appeals announced that a defendant is entitled under the procedural component of the due process clause to notice of the effects his trial strategy will have on the subsequent capital sentencing. App. 18. The Court of Appeals further held that harmless error analysis may never be applied to this newly-created "*ex post facto*-type" due process violation because the error pervades the entire proceeding. App. 21.

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## REASONS FOR GRANTING THE WRIT

### I. THE COURT OF APPEALS' NOVEL DUE PROCESS THEORY EXPANDS THE *EX POST FACTO* PROHIBITION IN CONFLICT WITH DECISIONS OF THIS COURT.

In essence, the decision of the Court of Appeals created a new extension of the *ex post facto* prohibition, labeled it a "due process violation," and barred the application of the harmless error doctrine to all such errors. In fact, the Court of Appeals refused to apply the well-established doctrine developed by this Court over a period of two hundred years, beginning with *Calder v.*

*Bull*, 3 Dall. 386 (1798); and *Hopt v. Utah*, 110 U.S. 574 (1884); and continued in *Dobbert v. Florida*, 432 U.S. 282 (1977). Judge Wallace, in his separate concurrence and dissent, explained the potential consequences of the decision in this case as follows:

To allow litigants to repackage their *ex post facto* challenges to ameliorative laws as due process claims requiring *per se* reversal would in effect eliminate a significant limitation in *ex post facto* doctrine.

App. 40.

While the above comment was made in the context of the harmless error issue, the Court of Appeals' decision has a broader impact because allowing criminals to "repackage" their claims under the due process clause will obliterate an entire branch of *ex post facto* jurisprudence. It has long been held that procedural and ameliorative changes, which do not affect the substantial rights of defendants, are not prohibited by the *ex post facto* clause. *Hopt v. Utah*, 110 U.S. 574 (1884); *Duncan v. Missouri*, 152 U.S. 377 (1894); *Gibson v. Mississippi*, 162 U.S. 565 (1896); *Thompson v. Missouri*, 171 U.S. 380 (1898); *Beazell v. Ohio*, 269 U.S. 167 (1925); *Dobbert v. Florida*, 432 U.S. 282 (1977); *Miller v. Florida*, 482 U.S. 423 (1987). This is true even though it may work to the disadvantage of the defendant. *Dobbert v. Florida*, 432 U.S. 282, 293 (1977); *Beazell v. Ohio*, 269 U.S. 167, 170 (1925). This Court has balanced the State interests in the administration and orderly progression of the law and the interests of the criminal defendant in a fair trial, and has reached an equitable compromise which recognizes that "[t]he inhibition upon the passage of *ex post facto* laws does not give a criminal a right to be tried, in all respects, by the law in



force when the crime charged was committed." *Gibson v. Mississippi*, 162 U.S. 565, 590 (1896), quoted in *Dobbert v. Florida*, 432 U.S. 282, 293 (1977).

The categories of *ex post facto* laws were set out by Justice Chase in *Calder v. Bull*, 3 Dall. 386, 390 (1798), as follows:

1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that *alters the legal rules of evidence*, and receives less, or different, testimony, than the law required at the time of the commission of the offense, *in order to convict the offender*. [Original emphasis deleted, emphasis added.]

In addition, a law which deprives one charged with a crime of any defense available at the time of the commission of the offense is prohibited as *ex post facto*. *Kring v. Missouri*, 107 U.S. 221 (1882). Clearly, the 1977 Montana sentencing statutes do not fall into any of the enumerated categories. Similar to the situation in *Dobbert*, here the new statutes lessen the rigor of the former mandatory death penalty by giving the defendant a second chance for life with the sentencing judge, following the constitutionally approved hearing allowing the presentation of aggravating and mitigating circumstances. *Gregg v. Georgia*, 428 U.S. 153 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976). The rules of evidence were not changed to the detriment of Coleman in relation to the issue of guilt or innocence of the crimes charged. It is thus clear that any use of the trial testimony

at the subsequent sentencing hearing was permissible under settled *ex post facto* principles, as a procedural change having no material impact on Coleman's substantive rights.

Ignoring these time-worn and well-reasoned principles, the Court of Appeals determined, without citation to any supporting authority, that Coleman had a due process right to notice of every detail of the procedures for sentencing so that he could plan his trial strategy accordingly. Quite obviously, the Court of Appeals simply, and with no analytical predicate, grafted an additional requirement onto the *ex post facto* analysis under the rubric of due process. This Court's *ex post facto* jurisprudence has already recognized the necessity for fair warning of the effect of legislation and the reliance by individuals upon the existing law. *Weaver v. Graham*, 450 U.S. 24, 28-29 (1981); *Dobbert v. Florida*, 432 U.S. 282, 298 (1977); *Miller v. Florida*, 482 U.S. 423, 430 (1987). At the same time, the balance of interests requires the compromise noted earlier, i.e., that a criminal defendant cannot expect to be tried in all respects under the law as it existed at the time of the offense. By repackaging Coleman's *ex post facto* claim as a due process claim, the Court of Appeals has blurred the distinction between clauses of the Constitution. This radical and unprecedented departure from otherwise established constitutional standards deserves the attention of and correction by this Court.

**II. NEW CONSTITUTIONAL RULES OF CRIMINAL PROCEDURE SHOULD NOT BE APPLIED ON COLLATERAL REVIEW WHERE DIRECT REVIEW OF THE CONVICTION WAS FINAL PRIOR TO THE ANNOUNCEMENT OF THE NEW RULE.**

In *Teague v. Lane*, 109 S. Ct. 1060, 1074 (1989), this Court recognized that habeas corpus is a collateral remedy providing an avenue for upsetting otherwise final judgments and that "application of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system." A plurality of the Court held that, unless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to a case which is on collateral review if direct review of the case was completed before the new rule was announced. 109 S. Ct. at 1075, 1078.

Direct review of Coleman's death sentence was completed in 1979. In resentencing Coleman, the State relied upon *Dobbert v. Florida*, 432 U.S. 282 (1977), which was the sole existing authority at the time of Coleman's resentencing and direct review. That case held that procedural and largely ameliorative changes in capital sentencing laws may be applied retroactively, even though the defendant may be disadvantaged in some manner.

Ten years later, in the decision below, the Court of Appeals adopted a new constitutional rule which was not dictated by precedent existing at the time the defendant's conviction became final. *Teague v. Lane*, 109 S. Ct. at 1070. In reaching its conclusion, the Court of Appeals relied upon *Bouie v. City of Columbia*, 378 U.S. 347 (1964), which

held that an unforeseeable judicial interpretation of a statute defining a crime cannot be retroactively applied to bar conduct which previously was innocent. The Court in *Bouie* noted:

If a state legislature is barred by the *Ex Post Facto* Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction.

*Id.*, 378 U.S. at 353-54. The Court of Appeals has made an unwarranted backward leap in extending the due process theory of *Bouie* to bar the retroactive application of capital sentencing legislation, since retroactive criminal legislation has historically been governed by the *ex post facto* clause. The Court of Appeals' new rule does not fall within the two exceptions discussed in *Teague*. It does not place certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe, and it is not a watershed rule implicating the fundamental fairness of the trial and seriously diminishing the likelihood of an accurate conviction.

Because *Teague* was not under sentence of death, this Court specifically declined to express a view as to how the retroactivity approach adopted in *Teague* is to be applied in the capital sentencing context, but did note:

We do, however, disagree with Justice STEVENS' suggestion that the finality concerns underlying Justice Harlan's approach to retroactivity are limited to "making convictions final," and are therefore "wholly inapplicable to the capital sentencing context." *Post*, at 1081, n.3. As we have often stated, a criminal judgment necessarily includes the sentence imposed upon the defendant. See generally *Flynt v. Ohio*, 451 U.S. 619, 620 (1981) (*per curiam*). Collateral

challenges to the sentence in a capital case, like collateral challenges to the sentence in a noncapital case, delay the enforcement of the judgment at issue and decrease the possibility that "there will at some point be the certainty that comes with an end to litigation." *Sanders v. United States*, 373 U.S. 1, 25 (1963) (Harlan, J., dissenting). Cf. U.S. Dept. of Justice, Bureau of Justice Statistics, Capital Punishment 1987, at 9 (1988) (for the ten-year period from 1977-1987, the average elapsed time from the imposition of a capital sentence to execution was 77 months) (Table 10).

109 S. Ct. at 1077 n.3. Application of a creative due process theory in this case undermines the finality of a fourteen-year-old sentence, destroys any deterrent effect of the sentence, and makes a mockery of the criminal justice system. The *Teague* rationale logically encompasses capital sentencing matters and should preclude application of the novel due process theory created below.

### III. THE OPINION INCORRECTLY AND UNNECESSARILY DETERMINES THAT AN "EX POST FACTO-TYPE DUE PROCESS VIOLATION" MAY NEVER BE HARMLESS.

#### A. Harmless error analysis is not precluded by the nature of the violation.

The Court of Appeals held that the harmless error analysis of *Chapman v. California*, 386 U.S. 18 (1967), and its progeny can never apply to a denial of this newly-created due process right to advance notice of the procedures to be followed in capital sentencing. As noted by Judge Wallace in his dissent from this holding, App. 28, the Court of Appeals failed to apply this Court's recent holding in *Rose v. Clark*, 478 U.S. 570, 579 (1986):

[I]f the defendant had counsel and was tried by an impartial adjudicator, there is a *strong presumption* that any other errors that may have occurred are subject to harmless error analysis . . . . Where a reviewing court can find that the record developed at trial establishes guilt beyond a reasonable doubt, the interest in fairness has been satisfied and the judgment should be affirmed. As we have repeatedly stated, "the Constitution entitles a criminal defendant to a fair trial, not a perfect one." [Citations omitted, emphasis added.]

In addition, as Judge Wallace also noted, *ex post facto* jurisprudence includes an analysis similar to harmless error as part of the inquiry into whether the substantive right has been violated. App. 39-40. Cf. *Weaver v. Graham*, 450 U.S. 24, 33-34 (1981) (change in gain-time law materially disadvantageous to prisoner). Thus, the Court of Appeals decision conflicts in principle with this Court's philosophy of protecting only the substantial rights of criminal defendants.

While the Court of Appeals recognized that harmless error analysis may be applied in capital cases, App. 19, see, e.g., *Satterwhite v. Texas*, 108 S. Ct. 1792 (1988), and that this case does not involve one of the categories which this Court has determined are exempt from harmless error analysis, App. 20, the lower court determined that the effect of this novel due process violation was so pervasive that it requires *per se* reversal. The opinion details several alleged changes in trial strategy which might have occurred had Coleman known there would be a sentencing hearing on aggravating and mitigating circumstances: (1) counsel may not have elicited Nank's testimony regarding the burglary, (2) counsel may not have put Coleman on the stand, and (3) counsel may have



moved to disqualify the trial judge. It is significant to note that Coleman has never argued that he would have disqualified the judge, *see* App. 37 (Wallace, J., dissenting), and that the issue of whether Coleman would have testified is a new argument raised by his appellate counsel for the first time in the briefs before the *en banc* Court of Appeals. Whether Coleman would have testified may be analyzed from the record by answering the question of whether Coleman's testimony was necessary to rebut the direct evidence against him in order to gain an acquittal, or, stated another way, whether Coleman would have been convicted and sentenced to death in the absence of his testimony. The issue of disqualification of the sentencing judge is speculation newly injected into the case by the Court of Appeals, and for this reason should not be considered. In any event, the record discloses no attempt by Coleman to disqualify the trial judge for bias or partiality prior to the resentencing hearing. Nor is there any reflection of bias against Coleman in the record.

Coleman consistently has argued in both state and federal courts that he would not have elicited the burglary testimony. Whether this evidence affected the sentence is a question which lends itself to harmless error analysis and which can be determined from the record. *See Satterwhite v. Texas*, 108 S. Ct. at 1798 (1988). The majority opinion decides that the sentencing judge denied Coleman "any statutory credit in mitigation for not having any prior history of criminal activity," and that "[d]eprivation of this mitigating factor was critical, because it eliminated a circumstance that might have overcome the aggravating factor and allowed Coleman to avoid the death penalty." App. 15, fn.8. Its conclusion

ignores the extensive record on this point, which conclusively shows that, in the absence of disclosure to the sentencing judge of the commission by Coleman of the uncharged burglary, the resulting credit to Coleman of the statutory mitigating circumstance of "no significant history of prior criminal activity" would not have been sufficiently substantial to call for leniency. The sentencing judge in effect so stated, both in his written conclusion that "the only mitigating circumstance technically present in this cause is that the defendant has no record history of prior criminal activity," App. 332, and in his oral statement at the time of pronouncement of sentence:

THE COURT: In pronouncing sentence I do want the parties to know that this is a decision that is extremely agonizing for the Court to make. I have not looked at the points that have been raised lightly, but many of the arguments raised by the defense, of course have been considered heretofore, and the jury have found from the factual standpoint that the defendant was guilty beyond a reasonable doubt, and I do not disagree with that conclusion of the jury. *The one mitigating circumstance is that the defendant has not prior to this time been convicted of any felony, but in the view of the enormity of the crime committed, and the Court's feeling that this one circumstance does not overcome the aggravated circumstances* I have made findings to this effect, written findings as required by the law. Also, I have made conclusions and judgment which have been furnished to the defendant and the state at this time, and I will only at this time read the Court's conclusions and judgment. [Emphasis added.]

Sentencing Tr. at 37:22-38:16. Therefore, the record on its face shows that the consideration of the uncharged burglary did not contribute to the determination that mitigating circumstances were not sufficient to call for



leniency. It has also been pointed out that the prosecution would have introduced the burglary evidence at the sentencing hearing had it not been brought out at trial. App. 87 (panel majority opinion). The fact that the prosecution was aware of the burglary may be inferred from Nank's testimony that the rifles were in the possession of the sheriff, App. 317, and from the fact that Nank had been instructed not to testify about Coleman's other crimes on direct examination. App. 320.

If harmless error cannot be determined from the record, then Judge Wallace's suggestion that an evidentiary hearing on this issue should be held in district court is the appropriate remedy. App. 28. The prosecution should be given the opportunity to prove that the error, if any, was harmless beyond a reasonable doubt.

- B. Assuming arguendo that the error was not harmless, the Court's remedy is not sufficiently narrowly tailored.**

Without elucidation, the Court of Appeals apparently precluded the State from conducting a new resentencing hearing and applying the 1977 capital sentencing statutes. See App. 69-70 (Alarcon, concurring and dissenting). This result goes far beyond the required remedy in this case. The ultimate remedy for mistakenly admitted testimony which did not affect the conviction should be a resentencing hearing in which the burglary is not considered. The ultimate remedy for an allegedly biased sentencing judge and for the wrongful consideration by the sentencer of Coleman's testimony should be a resentencing by a different judge who had reviewed the evidence admissible

for sentencing purposes. The Court of Appeals did not afford the State the opportunity to resentence Coleman to death, yet there was no ruling on whether the retroactive application of the new statutes would run afoul of the *ex post facto* prohibition. As stated by Judge Alarcon:

[I]f the majority has silently concluded that a state may not resentence a condemned person under a statute enacted after his or her conviction, I respectfully suggest that this important constitutional issue is deserving of thoughtful discussion and critical analysis.

App. 70.

~~In~~ its haste to invalidate the death sentence in this case, a sentence which Montanans through their legislators have determined to be appropriate for the severity of this crime, the Court of Appeals invented out of thin air a new due process violation requiring *per se* reversal. The opinion not only works a great injustice, but also bodes ill for future capital cases in this circuit, as the claims of criminals may be transfigured into due process claims.

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## CONCLUSION

For the foregoing reasons, the petitioner respectfully requests that a writ of certiorari issue to review the decision of the Ninth Circuit Court of Appeals.

Respectfully submitted,

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July 1989



## APPENDIX

APPENDIX A, Opinion of the Court of Appeals <i>en banc</i> panel.....	App. 1
APPENDIX B, Opinion of the Court of Appeals three-judge panel (Withdrawn).....	App. 74
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APPENDIX A  
FOR PUBLICATION  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

DEWEY E. COLEMAN,	)	
<i>Petitioner-Appellant,</i>	)	
<i>v.</i>	)	No. 85-4242
JACK McCORMICK, Warden,	)	D.C. No.
Montana State Prison, and	)	CV-81-272-BLG
MICHAEL T. GREELY,	)	OPINION
Attorney General for	)	
the State of Montana,	)	
<i>Respondents-Appellees.</i>	)	

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Appeal from the United States District Court  
for the District of Montana

James F. Battin, District Judge, Presiding

Argued En Banc and Submitted

July 20, 1988 - San Francisco, California

Filed May 5, 1989

Before: Goodwin, Chief Judge, and Wallace, Hug, Tang,  
Fletcher, Alarcon, Canby, Reinhardt, Noonan, Thompson  
and Trott, Circuit Judges.

Opinion by Judge Thompson; Concurrence and Dissent  
by Judge Wallace; Concurrence by Judge Reinhardt;  
Concurrence by Judge Trott, joined by Judge Thompson;  
Concurrence and Dissent by Judge Alarcon

COUNSEL

Timothy K. Ford, Seattle, Washington, for the petitioner-  
appellant.

Patricia J. Schaeffer, Assistant Attorney General, State of Montana, Helena, Montana, for the respondents-appellees.

## OPINION

THOMPSON, Circuit Judge:

Dewey E. Coleman, a Montana state prisoner who has been sentenced to death for the crime of aggravated kidnapping, appeals from the district court's denial of his petition for a writ of habeas corpus under 28 U.S.C. § 2254. We reverse his sentence of death and remand for resentencing.

### I

## FACTS AND PRIOR PROCEEDINGS

The facts upon which Dewey Coleman was found guilty by a jury on November 14, 1976, are fully set forth in Coleman's first appeal to the Montana Supreme Court and need not be repeated here. *State v. Coleman*, 177 Mont. 1, 579 P.2d 732 (1978) (*Coleman I*). The following are the facts relevant to the instant appeal.

Coleman, who is black, and his codefendant, Robert Nank, who is white, were charged with the crimes of deliberate homicide, aggravated kidnapping and sexual intercourse without consent, inflicting bodily injury. Nank entered a plea bargain with the State and escaped the death penalty. The State refused to enter a similar bargain with Coleman for reasons which we need not consider in this opinion. Coleman went to trial and was convicted on all counts. He was sentenced to 100 years



for deliberate homicide and 40 years on the rape charge. He was sentenced to death for aggravated kidnapping under Montana's then existing mandatory death penalty statute.<sup>1</sup> On appeal, the Montana Supreme Court held that the mandatory death penalty statute was unconstitutional. *Coleman I*, 177 Mont. 1, 579 P.2d at 741-42. Coleman's death sentence was vacated and his case was remanded to the trial court for resentencing.<sup>2</sup> Coleman was then resentenced to death in 1978 under a new Montana death penalty statute which had been enacted in 1977. Mont. Code Ann. §§ 95-2206.6-.15 (now codified at Mont. Code Ann. §§ 46-18-301 to 46-18-310; hereinafter cited in precodification version and reproduced at Appendix). Coleman's sentence was automatically reviewed by the Montana Supreme Court. Mont. Code Ann. §§ 95-2206.12-.15. The court upheld his convictions

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<sup>1</sup> The statute provided that "[a] court shall impose the sentence of death following conviction of aggravated kidnapping if it finds that the victim is dead as a result of the criminal conduct." Rev. Code Mont. § 94-5-304 (1947) (repealed 1977).

<sup>2</sup> Coleman's conviction on all three counts, and sentence for deliberate homicide, were affirmed. His death sentence and his sentence for sexual intercourse without consent, inflicting bodily injury were vacated. The Montana Supreme Court concluded there was insufficient evidence to show Coleman had inflicted bodily injury upon the victim in the course of committing sexual intercourse because she was murdered sometime after the rape incident. *Coleman I*, 177 Mont. 1, 579 P.2d at 742-43. On remand, Coleman was resentenced to death and was sentenced to 20 years for the crime of sexual intercourse without consent, the latter sentence to run consecutively to his sentence of 100 years for deliberate homicide. *Coleman II*, 185 Mont. 299, 605 P.2d 1000, 1007 (1979).

and sentences. *State v. Coleman*, 185 Mont. 299, 605 P.2d 1000 (1979) (*Coleman II*), cert. denied, 446 U.S. 970 (1980); *Coleman v. Sentencing Review Division of Supreme Court of Montana*, 449 U.S. 893 (1980) (vacating stay of execution of death sentence and denying certiorari).

Thereafter, Coleman filed a petition with the state court for post-conviction relief. His judgment and sentence were once again reviewed and affirmed by the Montana Supreme Court. *Coleman v. State*, 633 P.2d 624 (Mont. 1981), cert. denied, 455 U.S. 983 (1982) (*Coleman III*).

Coleman then filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254 in the United States District Court for the District of Montana. This proceeding was stayed to enable Coleman to exhaust his state remedy for review of his convictions and death sentence in light of a recent discovery by his then counsel of a transcript of a pretrial hearing. The transcript revealed that during the hearing Coleman's previous counsel had made statements to the court which implied that Coleman had admitted participating in the murder after being given sodium amytal. The judge who had presided at this pretrial hearing was the same judge who later sentenced Coleman to death. Coleman's convictions and death sentence were once again reviewed and affirmed by the Montana Supreme Court. *Coleman v. Risley*, 663 P.2d 1154 (Mont. 1983) (*Coleman IV*).

Coleman then returned to the district court. He filed a motion for an evidentiary hearing on his habeas corpus petition. He sought a hearing on twelve of thirty-seven issues raised in his petition, and filed a motion for summary judgment on the remaining issues. The State also filed a motion for summary judgment. The district court denied Coleman's request for an evidentiary hearing,

denied his motion for summary judgment, and granted summary judgment in favor of the State.

## II

### THE CONVICTION

#### *Jury Selection*

Coleman challenges his convictions on the ground that his sixth amendment right to an impartial jury was violated. He contends his jury panel was selected in an impermissibly discretionary manner.<sup>3</sup>

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<sup>3</sup> In his dissent, Judge Alarcon contends Coleman also seeks reversal of his convictions on the ground that he was denied effective assistance of counsel, because his first attorney told the court at a pretrial hearing that Coleman had taken a sodium amytal test and had admitted participating in the crimes with which he was charged. We disagree with this characterization of Coleman's appeal. Coleman's attack regarding the sodium amytal procedure and his attorney's revelation of its results is not directed to his convictions, but to his sentence. Coleman's argument is that he was sentenced to death without due process because the results of the sodium amytal test were revealed to the judge who later became the judge who sentenced him to death. Appellant's Brief, pp. 22-24. No argument is made that this incident had any effect on Coleman's convictions. Because we reverse Coleman's death sentence on other grounds, we do not reach his sodium amytal/ineffective assistance of counsel argument.

The dissent also contends Coleman has raised an issue on appeal concerning the sufficiency of the evidence on which he was convicted. We disagree. Coleman's only argument about the evidence presented at his trial concerns the effect such evidence was given when he was sentenced to death. See Appellant's Brief, p. 48.

Coleman's first jury panel was dismissed by the Court three days before trial in response to a challenge by Coleman. A second panel was drawn. Each name on the jury list was assigned a number, the numbers were placed in a box, and 200 were drawn. The court then directed the court clerk to obtain a panel of sixty jurors by telephoning persons whose names were drawn from the box to see if they would be available to serve on a jury within the next three days. Sixty-one of the prospective jurors indicated they would be available and sixty appeared for Coleman's trial. *Coleman I*, 177 Mont. 1, 579 P.2d at 746-47. It was from this panel that Coleman's trial jury was chosen.

In arguing that the sixty persons making up his jury panel were impermissibly selected, Coleman alleges that potential jurors were asked whether they could appear for his trial and were allowed to excuse themselves on grounds not revealed to him. He further alleges that the system by which his panel of sixty potential jurors was selected had the disproportionate effect of placing mainly white, affluent residents from the west side of Billings, Montana on the panel. He argues that this system was controlled, not random, and resembled the so-called "key man" system of jury selection.<sup>4</sup>

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<sup>4</sup> Coleman's argument that his jury panel was selected using the key man system is without merit. The key man system of jury selection involves the selection of particular persons to make up a pool from which a jury is then chosen at random. It is not unconstitutional on its face. *Castaneda v. Partida*, 430 U.S. 482, 497 (1977); *United States v. Nelson*, 718 F.2d 315, 319 (9th Cir. 1983). Here there is nothing to suggest the jury panel was chosen using the key man system. The

(Continued on following page)

Coleman contends that he is entitled to an evidentiary hearing on this issue. To obtain an evidentiary hearing, Coleman "must show that (1) he has alleged facts which, if proved, would entitle him to relief, and (2) an evidentiary hearing is required to establish the truth of his allegations." *Harris v. Pulley*, 692 F.2d 1189, 1197 (9th Cir. 1982), *rev'd on other grounds*, 465 U.S. 37 (1984); *see also Bashor v. Risley*, 730 F.2d 1228, 1233 (9th Cir.), *cert. denied*, 105 S. Ct. 137 (1984).

#### A. Lack of Showing of Distinctive Group

Trial by a jury of one's peers contemplates that an impartial jury will be drawn from a fair cross-section of the community. *Thiel v. Southern Pacific Co.*, 328 U.S. 217, 220 (1946). The sixth amendment does not guarantee a randomly selected jury, *United States v. Wellington*, 754 F.2d 1457, 1468 (9th Cir.), *cert. denied sub nom. Utz v. United States*, 106 S. Ct. 592, 593 (1985), nor does it require that the jury contain representatives from every group in the community. *Lockhart v. McCree*, 476 U.S. 162, 173-75 (1986); *Thiel*, 328 U.S. at 220. A fair cross-section challenge to the constitutionality of the jury venire requires a showing:

- (1) [T]hat the group alleged to be excluded is a 'distinctive' group in the community;

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(Continued from previous page)

initial 200 jurors were selected at random. *Cf. Castaneda*, 430 U.S. at 497. The panel of sixty potential jurors were in essence volunteers, a fact which standing alone does not render the composition of a panel unconstitutional. *Nelson*, 718 F.2d at 319.

- (2) [T]hat the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and
- (3) [T]hat this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

*United States v. Miller*, 771 F.2d 1219, 1228 (9th Cir. 1985) (quoting *Duren v. Missouri*, 439 U.S. 357, 364 (1979)).

Coleman contends that as a result of the jury selection process, persons from the lower socioeconomic areas of Billings were excluded from his panel of prospective jurors. He has not alleged any facts, however, from which it could be concluded that persons from the lower socioeconomic areas of Billings formed a distinctive group in the community, or that if such a group existed it consisted of a sufficient number of persons so that its systematic exclusion from jury panels would support a fair cross-section challenge under the sixth amendment. *Duren*, 439 U.S. at 364; see *Taylor v. Louisiana*, 419 U.S. 522, 531 (1975); *United States v. Kleifgen*, 557 F.2d 1293 (9th Cir. 1977); *United States v. Potter*, 552 F.2d 901, 904-05 (9th Cir. 1977). Having failed to demonstrate the existence of a "distinctive" group, Coleman's claims that such a group was underrepresented in jury venires or was systematically excluded in the jury selection process also fail.

#### B. Method of Selection of Available Jurors

Coleman challenges the clerk's dismissal of 139 of the 200 potential jurors drawn from the box. There is nothing in the record, however, to suggest that the jurors who were excused by the clerk were excused for any reason



other than their inability to serve in a jury trial which was to commence in three days. *Coleman I*, 177 Mont. 1, 579 P.2d at 746. Coleman does not contend, nor does the record reveal, that the 200 names from which the 60 members of his panel were chosen do not represent a fair cross-section of the community.

The method of jury selection in Coleman's case was similar to that which occurred in *United States v. Anderson*, 509 F.2d 312 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 991 (1975). There, 200 to 300 jurors were selected for jury service. The defendant did not contend that these jurors were not representative of a fair cross-section of the community. The jurors were told that the trial would be lengthy and the court asked how many jurors would be able to serve. Sixty-eight jurors indicated they would be available, and sixty of these were selected for the panel. *Id.* at 321. On appeal the defendant contended the jurors consisted of volunteers and thus did not represent a cross-section of the community. *Id.* In rejecting this contention, the court concluded that the underlying complement of jurors represented a fair cross-section of the community and "[n]either the panel nor the trial jury became any the less so by reason of the technique the judge employed." *Id.* at 322. The court went on to state, "the judge did not exclude anyone or any cognizable group. The sole criterion he employed was ability to serve longer; the panel from which the jury was drawn was distinguished only by that quality." *Id.* (footnote omitted); *see also United States v. Branscome*, 682 F.2d 484, 485 (4th Cir. 1982) (grand jury); *United States v. Kennedy*, 548 F.2d 608, 611 (5th Cir.), *reh'g denied*, 554 F.2d 476 (5th Cir.), *cert. denied*, 434 U.S. 865 (1977).

Coleman did not present any affidavit or other evidence to suggest jurors were dismissed for any reason other than unavailability. His challenge to the sixty-person jury panel "consists exclusively of counsel's statements, unsworn and unsupported by any proof or offer of proof." *Frazier v. United States*, 335 U.S. 497, 503 (1948). These "conclusory allegations do not provide a sufficient basis to obtain a hearing in federal court." *Harris*, 692 F.2d at 1199.

Finally, Coleman argues in his reply brief that the trial judge improperly disqualified two jurors because of their opposition to the death penalty. He has failed to present any showing that would justify an evidentiary hearing on this issue. *Maggio v. Williams*, 464 U.S. 46, 50 (1983) (per curiam).

We conclude that Coleman's sixth amendment right to an impartial jury was not violated.

### III

#### THE SENTENCE

Coleman challenges his sentence of death on the grounds that (a) his resentencing under the 1977 death penalty statute violated the *ex post facto* clause of the Constitution; (b) Montana's death penalty statute unconstitutionally required him to bear the burden of proof of mitigating factors; (c) his trial and death sentence, which occurred because the State refused to make the same plea bargain with him that it made with Nank, were the result of racial discrimination; and (d) he was denied due process of law when he was sentenced to death under a statute not in effect at the time of his trial. Because we



reverse Coleman's death sentence on the ground that he was denied due process in the imposition of that sentence, we do not reach Coleman's other arguments.<sup>5</sup>

Coleman was convicted and first sentenced to death in 1975 under a mandatory death penalty statute subsequently held to be unconstitutional in 1978 by the Montana Supreme Court in *Coleman I*, 177 Mont. 1, 579 P.2d at 741-42.<sup>6</sup> In 1977, the Montana legislature repealed the death penalty statute under which Coleman had originally been tried and sentenced and passed a new death penalty statute, the constitutionality of which Montana's supreme court upheld in *State v. McKenzie*, 177 Mont. 280, 581 P.2d 1205, 1228-29 (Mont. 1978), *vacated on other grounds*, 443 U.S. 903 (1979). Coleman was resentenced to death in 1978 under this new statute.

Pursuant to section 95-2206.6 of the 1977 statute (*see* Appendix), the judge who presided over the trial is also required to conduct a sentencing hearing and determine whether, under sections 95-2206.8 or 95-2206.9 of the

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<sup>5</sup> Both parties agree, and it is clear from the record, that Coleman has exhausted his state remedies on this issue by arguing before the Montana courts that the application of Montana's 1977 death penalty law to this case violated due process. The issue is thus properly before us on appeal.

<sup>6</sup> In *Coleman I*, the Montana Supreme Court held that Montana's mandatory death penalty statute was unconstitutional because "[t]here is no provision for the trial court to consider any mitigating circumstances." *Coleman I*, 177 Mont. 1, 579 P.2d at 742. The court found the requirements of the statute were inconsistent with the Supreme Court's holdings in *Woodson v. North Carolina*, 428 U.S. 280 (1976), *Coker v. Georgia*, 433 U.S. 584 (1977) and *Roberts v. Louisiana*, 431 U.S. 633 (1977).

statute, there exist any aggravating or mitigating circumstances for purposes of determining the sentence to be imposed. Under this statutory scheme, the trial court must impose a sentence of death if it finds the existence of at least one of the enumerated aggravating circumstances, "and finds that there are no mitigating circumstances sufficiently substantial to call for leniency." Mont. Code Ann. § 95-2206.10. The aggravating circumstance relevant to this case is subsection (7) of section 95-2206.8: "[t]he offense was aggravated kidnapping which resulted in the death of the victim." The sentencing judge concluded that there were no mitigating circumstances sufficiently substantial to call for leniency, and sentenced Coleman to death. Coleman contends that, in light of the procedural framework of the revised statute, the imposition of his death sentence under it violated the due process clause of the Constitution. We agree.

We begin our analysis of this issue by noting that the Supreme Court has not to date addressed a *due process* challenge to the retroactive application of a sentencing statute that resulted in the death sentence. The retroactive application of statutes has typically been challenged as violative of the *ex post facto* clause, U.S. Const., art. I, § 10. See, e.g., *Dobbert v. Florida*, 432 U.S. 282 (1977); *Thompson v. Missouri*, 171 U.S. 380 (1898); *Knapp v. Cardwell*, 667 F.2d 1253 (9th Cir.), *cert. denied*, 459 U.S. 1055 (1982). In *Dobbert*, the Supreme Court upheld the retroactive application of Florida's capital sentencing law under the *ex post*

*facto* clause, but did not address the due process issue.<sup>7</sup> The Court in *Dobbert* reiterated the "well settled" principle that the *ex post facto* clause does not "'limit the legislative control of remedies and modes of procedure which do not affect matters of substance.'" *Dobbert*, 432 U.S. at 293 (quoting *Beazell v. Ohio*, 269 U.S. 167, 171 (1925)). As a corollary to this principle, the Court noted that "[e]ven though it may work to the disadvantage of a defendant, a procedural change is not *ex post facto*." *Id.* By contrast, the procedural component of the due process clause protects individuals' rights to fundamentally fair procedures before they are deprived of their liberty rights. See *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 161 (1951) (Frankfurter, J., concurring). Especially in the capital sentencing arena, this court has

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<sup>7</sup> The Court in *Dobbert* upheld the imposition of a death sentence on a defendant who was tried and sentenced under a valid capital punishment statute even though the statute was not in effect at the time the crime was committed. The amendment to the statute came after commission of the crime but before trial. By contrast, in the present case Coleman was sentenced under an unconstitutional capital punishment statute. At least two courts have concluded that this factual distinction from *Dobbert* is decisive and have declined to resentence under new statutes defendants who were tried, convicted and sentenced under unconstitutionally defective statutes. See *Meller v. State*, 94 Nev. 408, 409 n.3, 581 P.2d 3, 4 n.3 (1978) (per curiam); *State v. Rogers*, 270 S.C. 285, 291, 242 S.E. 2d 215, 217-18 (1978); cf., *State v. Lindquist*, 99 Idaho 766, 589 P.2d 101, 105 (1979) (acknowledging factual distinction with *Dobbert* but resting decision on other grounds). Because we decide this case on due process grounds, rather than under the *ex post facto* clause as in *Dobbert*, we do not reach Coleman's *ex post facto* argument.

an obligation to scrutinize closely the sentencing procedures against "fundamental principles of procedural fairness." See *Presnell v. Georgia*, 439 U.S. 14, 16 (1978); *Gardner v. Florida*, 430 U.S. 349, 357 (1977).

When one compares the sentencing law in effect at the time Coleman was tried and sentenced with the law under which he was resentenced, it is apparent that application of the procedural aspects of the new statute to Coleman's case violated due process. Under the Montana death penalty statute which was in effect when Coleman was originally tried and sentenced, once a defendant was convicted of the crime of aggravated kidnapping, a sentence of death was mandatory. Rev. Code Mont. § 94-5-304 (1947) (repealed 1977). Montana law did not permit the sentencer to consider mitigating circumstances. Therefore, the only factor in Coleman's trial impacting whether he would live or die was whether or not he was convicted of aggravated kidnapping.

The new law under which Coleman was resentenced contains procedures which mandate what is tantamount to a second trial. This "second trial" is the sentencing hearing. The judge who presides over the guilt phase of the trial is the same judge who presides over the sentencing hearing. This judge decides whether a defendant lives or dies. Mont. Code Ann. § 95-2206.6. Evidence, regardless of its content, which came in during the guilt phase may be considered by the sentencing judge during the sentencing hearing. *Id.* § 95-2206.7.

As Coleman's counsel prepared for trial, during pre-trial proceedings, and during trial, he had no idea that the decisions he was making would have any effect on a

post-trial decision by the trial judge whether Coleman lived or died. Coleman's counsel could not have known that a new law would be enacted under which the same judge who presided at Coleman's trial would preside at a subsequent sentencing hearing and would consider, among other things, Coleman's prior record of criminal activity, be it good or bad. He only knew that if Coleman were convicted of aggravated kidnapping, he would die. Thus, it made no difference during Coleman's trial whether evidence of prior criminal activity came in. Indeed, Coleman's counsel presented just such evidence on cross-examination of Coleman's codefendant, Robert Nank. He elicited testimony from Nank (which Coleman denied) that Nank and Coleman had committed a robbery on the day of the murder. Coleman's counsel brought out this testimony in an apparent attempt to discredit Nank. But would he have done so if he had known this testimony would provide evidence to negate mitigation, a circumstance which could mean the death of his client?<sup>8</sup> Not knowing that there would be any post-conviction death penalty hearing, how could Coleman's counsel have gauged the probative value of this evidence in

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<sup>8</sup> When Coleman was resentenced under the new death penalty statute, the sentencing judge stated that he was relying on the burglary to which Nank testified, and which Coleman denied, to deny Coleman any statutory credit in mitigation for not having any prior history of criminal activity. See Mont. Code Ann. § 95-2206.9(1). Deprivation of this mitigating factor was critical, because it eliminated a circumstance that might have overcome the aggravating factor and allowed Coleman to avoid the death penalty.



deciding whether the chance of an acquittal was so enhanced by its admission that it was worth the risk to bring it before the jury, notwithstanding the consequences it might have at a later death penalty hearing before the trial judge? Would Coleman's counsel have made the tactical decision he made? We don't know. Coleman's counsel never had the opportunity to make this choice. The choice was made for him by application of the new death penalty statute at his sentencing hearing. Coleman's trial judge became his sentencer and all of the trial evidence relevant to the newly adopted categories of aggravating and mitigating circumstances became crucial to the sentencer's decision whether Coleman lived or died.

Coleman's testimony, to which the sentencing judge referred in imposing his sentence, also impacted the sentencing judge's imposition of the death penalty. Apparently Coleman's trial counsel believed that it was necessary for Coleman to testify in order to avoid a conviction. But would he have made this same choice if he had known Coleman's testimony, not only its content but Coleman's demeanor on the stand and how he held up under cross-examination, would be considered at a post-conviction sentencing hearing on the question whether Coleman lived or died? Again, this decision, whether or not to testify in one's own defense, can only be made rationally if the consequences of such a course of action are known. Here they were not.

The new death penalty statute also impacted the delicate decision of whether to challenge the trial judge. At the time Coleman was tried, Montana permitted a party to a criminal case to remove the assigned judge

without cause. Rev. Code Mont. § 95-1709 (1949) (amended and recodified at Mont. Code Ann. § 3-1-804). Indeed, the prosecution removed the first judge assigned to Coleman's case because of a belief that he was prejudiced against the prosecution's position. Coleman might have elected to remove the next judge who was assigned the case. He did not. But he did not know that under the new statute his trial judge would become his sentencer, if he were convicted. It is one thing to accept a judge for the purpose of conducting a fair trial, and quite another to accept that judge not only to conduct the trial but to become the sole decisionmaker on the question of life or death. Coleman had no reason to consider these factors under the old law. They became relevant only under the new law. Realistically, therefore, Coleman never had the opportunity to make an informed decision whether to challenge the trial judge, and thereby prevent him from becoming the sentencer. That scenario simply did not present itself under the old law. And yet, Coleman had to bear the consequence of sentencing under the new law as if such a decision had been made.

The finality and severity of a death sentence makes it qualitatively different from all other forms of punishment. See, e.g., *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (plurality opinion). The Supreme Court has stressed the great need for reliability in capital cases requiring that "capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of factfinding." *Strickland v. Washington*, 466 U.S. 668, 704 (1984) (Brennan, J., concurring in part and dissenting in part); see also *California v. Ramos*, 463 U.S. 992, 998-99 (1983) ("the qualitative difference of death from all



other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination") (footnote omitted).

"The defendant has a legitimate interest in the character of the procedure which leads to the imposition of [the death] sentence. . . ." *Gardner*, 430 U.S. at 358. When human life is at stake, the need to ensure that punishment is meted out fairly and in a noncapricious manner is preeminent. *Dobbert*, 432 U.S. at 309 (Stevens, J., dissenting). The defendant is due at least that amount of process which enables him to put on a defense during trial knowing what effect such a strategy will have on the subsequent capital sentencing, the results of which may be equally if not more critical to the defendant than the conviction itself.

Coleman was given no notice whatsoever of the life and death consequences of his actions in defending himself against the State's prosecution before and during trial. A defendant's right to notice and to fair warning of the conduct that impacts upon his liberty is a basic principle long recognized by the Supreme Court. Cf. *Bouie v. City of Columbia*, 378 U.S. 347, 350-51 (1964); *In re Oliver*, 333 U.S. 257, 273 (1948). Because Coleman had no reason to suspect that his decisions at trial would come back to haunt him at a sentencing hearing, we must conclude that he was denied due process when he was resentenced to death under Montana's revised death penalty statute.

The State argues that even if Coleman's due process rights were violated, the error was harmless. Ever since *Chapman v. California*, 386 U.S. 18 (1967), it has been the general rule that "an otherwise valid conviction should

not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt." *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986). The harmless error rule "recognizes . . . that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence . . . and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error." *Id.* (citations omitted). The Supreme Court has not exempted capital cases from harmless error analysis. *See, e.g., Satterwhite v. Texas*, 108 S. Ct. 1792 (1988) (applying harmless error analysis); *Gilbert v. California*, 388 U.S. 263 (1967) (same); *see also Hitchcock v. Dugger*, 107 S. Ct. 1821, 1824 (1987) (reversing death sentence because there was constitutional error and state did not show that error was harmless).

*Chapman* and its progeny have recognized, however, that the harmless error rule has exceptions. As the Court in *Chapman* observed, "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." 386 U.S. at 23; *see id.* at 23 n.8, citing *Gideon v. Wainwright*, 372 U.S. 335 (1963) (complete denial of right to counsel); *Payne v. Arkansas*, 356 U.S. 560 (1958) (introduction of coerced confession); *Tumey v. Ohio*, 273 U.S. 510 (1927) (adjudication by biased judge). Since *Chapman*, the Court has added to the list of constitutional violations which merit *per se* reversal. *See, e.g., Waller v. Georgia*, 467 U.S. 39, 49 & n.9 (1984) (public trial); *Holloway v. Arkansas*, 435 U.S. 475 (1978) (conflict of interest in representation throughout entire proceeding);

*Faretta v. California*, 422 U.S. 806 (1975) (self-representation); *Price v. Georgia*, 398 U.S. 323 (1970) (double jeopardy). In adding to this list, however, the Court has emphasized that the "errors to which *Chapman* does not apply . . . are the exception and not the rule." *Rose v. Clark*, 478 U.S. 570, 578 (1986).

This case does not involve one of the categories listed above which the Supreme Court has determined to be exempt from *Chapman* harmless error analysis. In this case, the critical factor rendering violations of these rights inappropriate for harmless error analysis is the reviewing court's inability to determine whether such violations were in fact harmless beyond a reasonable doubt. See, e.g., *Satterwhite*, 108 S. Ct. at 1798 (harmless error rule applies since "reviewing court *can make an intelligent judgment* about whether the erroneous admission of psychiatric testimony might have affected a capital sentencing jury") (emphasis added). Errors that either "abort[] the basic trial process . . . or den[y] it altogether," *Rose*, 478 U.S. at 578 n.6, have an effect on the composition of the record so pervasive that it cannot be determined by the reviewing court. See also *Satterwhite*, 108 S. Ct. at 1797 (errors that "pervade the entire proceeding" and whose scope "cannot be discerned from the record" require *per se* reversal); *Van Arsdall*, 475 U.S. at 681 (suggesting that errors having a pervasive effect on the factfinding process are not susceptible to harmless error analysis). To apply harmless error analysis under such circumstances would require the reviewing court to engage in an inquiry that was "purely speculative." *Satterwhite*, 108 S. Ct. at 1797.

Applying the foregoing principles to this case, we hold that the due process violation here is not subject to harmless error analysis. Coleman was sentenced to death under a statute not in effect at the time of his trial. The new statute added a sentencing "trial" at which the sentencing judge could consider any evidence that came in during the guilt phase. By contrast, the old statute required the death penalty once a defendant was convicted of aggravated kidnapping. Coleman's counsel made countless tactical decisions at trial aimed solely at obtaining Coleman's acquittal, without even a hint that evidence in the record would be considered as either mitigating or aggravating factors. This due process violation had a pervasive effect on the composition of the trial record. As we have already observed, Coleman's counsel might not have called his client to testify under the new statute. He might not have brought in evidence of Coleman's prior criminal activity in his cross-examination of Nank. He might have challenged the trial judge. It would be fruitless in this case to require trial counsel to provide a record of how he or she would have handled the case differently. The error is such that no additional evidence is needed to demonstrate that the error "pervade[s] the entire proceeding." *See id.*; *see also Raley v. Ohio*, 360 U.S. 423, 439 (1959) (it is impermissible in a criminal case to excuse due process violations by assuming that the defense would have acted as it did had no violation occurred). We will not affirm Coleman's death sentence by speculating that his defense counsel might have made the same pretrial and trial decisions regardless of the sentencing scheme. *See Givens v. Housewright*, 786 F.2d 1378, 1381 (9th Cir. 1986).

We, therefore, REVERSE the district court and REMAND with instructions to determine a reasonable time for the State to vacate Coleman's sentence of death on the aggravated kidnapping count. If within such time the State does not vacate Coleman's death sentence, the district court is instructed to grant the writ of habeas corpus as to the aggravated kidnapping count.<sup>9</sup> The opinion of the three-judge panel in this case, reported at 839 F.2d 434 (9th Cir. 1988), is withdrawn.

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<sup>9</sup> Coleman's contention that he was prosecuted, and sentenced to death, because of race discrimination when the state plea bargained with Nank, a white man, but refused to enter into a plea bargain with Coleman, who is black, does not impact his conviction of deliberate homicide. He would have been convicted upon his offer to plead guilty to this crime in any event. Nor does it have any disadvantageous impact on Coleman by reason of his conviction of sexual intercourse without consent, a crime different from the crime of solicitation to commit sexual intercourse to which Nank pleaded guilty. Nank's sentence for solicitation to commit sexual intercourse (Nank being the "solicitor" and Coleman the "solicitee") was 40 years. Coleman's sentence for sexual intercourse without consent, the crime he was eventually left convicted of following his first appeal, was 20 years. Both sentences were the maximums for the respective crimes. The disparity in the sentences occurred when the Montana Supreme Court struck the bodily injury element from Coleman's conviction of sexual intercourse without consent.

Coleman's racial discrimination claim, however, does impact his conviction of aggravated kidnapping, a crime to which his plea offer would not have applied. Upon resentencing, the state court will have to determine what sentence to impose on Coleman and how to treat his conviction of aggravated kidnapping in view of our reversal of his death sentence. Until Coleman is resentenced, we cannot evaluate the merits of

(Continued on following page)



APPENDIX

95-2206.6. Sentence of death – hearing on imposition of death penalty. When a defendant is found guilty of or pleads guilty to an offense for which the sentence of death may be imposed, the judge who presided at the trial or before whom the guilty plea was entered shall

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(Continued from previous page)

his claim of racial discrimination based upon the state's refusal to plea bargain with him as it did with Nank.

In his dissent, Judge Alarcon states that he "do[es] not understand the majority's reluctance to face up to Mr. Coleman's constitutional attack on the judgment of *conviction* for aggravated kidnapping, deliberate homicide, and forcible rape in the appeal presently before this court. If Mr. Coleman has stated sufficient facts to show that these convictions were obtained in violation of his constitutional rights, he is entitled to an evidentiary hearing in the district court now." Alarcon, J., dissenting, p. 4740. We disagree. There is a strong practical possibility that today's decision upholding one of Coleman's principal constitutional arguments will serve ultimately to make it unnecessary for us to consider Coleman's remaining claims. While this may depend in part on Coleman's and Montana's actions following remand, it would not be appropriate for us to presume that those actions will fail to eliminate any need for this court to address further constitutional arguments.

We express no opinion as to whether Montana would be precluded from again seeking the death penalty in the event Coleman obtains a new trial. Compare *Bullington v. Missouri*, 451 U.S. 430 (1981), and *Fitzpatrick v. McCormick*, No. 878-4027, slip op. (9th Cir. Mar. 7, 1989), with *United States v. DiFrancesco*, 449 U.S. 117 (1980); *North Carolina v. Pearce*, 395 U.S. 711 (1969); *Stroud v. United States*, 251 U.S. 15 (1919); and *United States v. Andersson*, 813 F.2d 1450 (9th Cir. 1987).

conduct a separate sentencing hearing to determine the existence or nonexistence of the circumstances set forth in 95-2206.8 and 95-2206.9 for the purpose of determining the sentence to be imposed. The hearing shall be conducted before the court alone.

95-22.06.7. Sentencing hearing – evidence that may be received. In the sentencing hearing, evidence may be presented as to any matter the court considers relevant to the sentence, including but not limited to the nature and circumstances of the crime, the defendant's character, background, history, mental and physical condition, and any other facts in aggravation or mitigation of the penalty. Any evidence the court considers to have probative force may be received regardless of its admissibility under the rules governing admission of evidence at criminal trials. Evidence admitted at the trial relating to such aggravating or mitigating circumstances shall be considered without reintroducing it at the sentencing proceeding. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

95-2206.8. Aggravating circumstances. Aggravating circumstances are any of the following:

- (1) The offense was deliberate homicide and was committed by a person serving a sentence of imprisonment in the state prison.
- (2) The offense was deliberate homicide and was committed by a defendant who had been previously convicted of another deliberate homicide.



(3) The offense was deliberate homicide and was committed by means of torture.

(4) The offense was deliberate homicide and was committed by a person lying in wait or ambush.

(5) The offense was deliberate homicide and was committed as a part of a scheme or operation which, if completed, would result in the death of more than one person.

(6) The offense was deliberate homicide as defined in subsection (1)(a) of 94-5-102 and the victim was a peace officer killed while performing his duty.

(7) The offense was aggravated kidnapping which resulted in the death of the victim.

95-2206.9. Mitigating circumstances. Mitigating circumstances are any of the following:

(1) The defendant has no significant history of prior criminal activity.

(2) The offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(3) The defendant acted under extreme duress or under the substantial domination of another person.

(4) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(5) The victim was a participant in the defendant's conduct or consented to the act.

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(6) The defendant was an accomplice in an offense committed by another person, and his participation was relatively minor.

(7) The defendant, at the time of the commission of the crime, was less than 18 years of age.

(8) Any other fact exists in mitigation of the penalty.

95-2206.10. Consideration of aggravating and mitigating factors in determining sentence. In determining whether to impose a sentence of death or imprisonment, the court shall take into account the aggravating and mitigating circumstances enumerated in 95-2206.8 and 95-2206.9 and shall impose a sentence of death if it finds one or more of the aggravating circumstances and finds that there are no mitigating circumstances sufficiently substantial to call for leniency. If the court does not impose a sentence of death and one of the aggravating circumstances listed in 95-2206.8 exists, the court may impose a sentence of imprisonment for life or for any term authorized by the statute defining the offense.

95-2206.11. Specific written findings of fact. In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact as to the existence or nonexistence of each of the circumstances set forth in 95-2206.8 and 95-2206.9. The written findings of fact shall be substantiated by the records of the trial and the sentencing proceeding.

95-2206.12. Automatic review of sentence. The judgment of conviction and sentence of death are subject to

automatic review by the supreme court of Montana as provided for in 95-2206.13 through 95-2206.15.

95-2206.13. Review of death sentence – priority of review – time for review. The judgment of conviction and sentence of death are subject to automatic review by the supreme court of Montana within 60 days after certification by the sentencing court of the entire record unless the time is extended by the supreme court for good cause shown. The review by the supreme court has priority over all other cases and shall be heard in accordance with rules promulgated by the supreme court. The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration.

95-2206.14. Transcript and records of trial transmitted. The clerk of the trial court, within 10 days after receiving the transcript, shall transmit the entire record and transcript to the supreme court.

95-2206.15. Supreme court to make determination as to the sentence. The supreme court shall consider the punishment as well as any errors enumerated by way of appeal. With regard to the sentence, the court shall determine:

(1) whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;

(2) whether the evidence supports the judge's finding of the existence or nonexistence of the aggravating or mitigating circumstances enumerated in 95-2206.8 and 95-2206.9; and

(3) whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. The court shall include in its decision a reference to those similar cases it took into consideration.

WALLACE, Circuit Judge, concurring in part and dissenting in part:

I agree with the majority that there was no infringement of Coleman's sixth amendment right to an impartial jury and, therefore, concur in part II of the opinion. I also agree with part III to the extent that resentencing Coleman under Montana's 1977 death penalty statute violated his due process rights. I disagree, however, with part III's statement that "[i]t would be fruitless in this case to require trial counsel to provide a record of how he or she would have handled the case differently." Maj. op. at 4701-02. Rather, I would remand for an evidentiary hearing to determine whether the due process violation was harmless beyond a reasonable doubt under *Chapman v. California*, 386 U.S. 18 (1967) (*Chapman*). As the Court recently held in *Rose v. Clark*, 478 U.S. 570 (1986), "while there are some errors to which *Chapman* does not apply, they are the exception and not the rule. . . . [I]f the defendant had counsel and was tried by an impartial adjudicator, *there is a strong presumption that any other errors . . . are subject to harmless-error analysis.*" *Id.* at 578-79 (citation omitted) (emphasis added). Under this holding, we should apply this strong presumption in this case. I do not see how the majority has rebutted this strong presumption.

Though brought under the due process clause, Coleman's argument closely resembles an *ex post facto* claim. See Maj. op. at 4694. The majority would add this new kind of due process violation to the restricted list of constitutional errors which require per se reversal. *Id.* at 4700-01. According to the majority, this due process violation had so pervasive an effect on the record that we, as a reviewing court, cannot determine whether the error was harmless beyond a reasonable doubt. *Id.* at 4700-01.

I agree that the record, in its present state, cannot yield an answer to the harmless error inquiry. In my view, however, the reason for this deficiency lies in the procedural posture of this case and not in the inherent nature of the right violated. The district court entered summary judgment for the State without holding an evidentiary hearing. Had it held an evidentiary hearing and considered Coleman's due process claim, the district court could have determined whether the due process violation was harmless beyond a reasonable doubt. We then would be in a position to "confidently say, on the whole record, [whether] the constitutional error was harmless beyond a reasonable doubt." *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986) (*Van Arsdall*) (emphasis added).

## I

Coleman's alleged prejudice could be evaluated by the district court on remand. The majority recites three specific examples of how Coleman might have been prejudiced. According to the majority, had Coleman's counsel known that his client would be sentenced under the 1977 statute, he (1) might not have called Coleman to testify,

(2) might not have brought in evidence of Coleman's prior criminal activity in his cross-examination of Nank, and (3) might have challenged the trial judge. *Id.* at 4701-02.

I see no reason why these (and any other) hypotheses cannot be tested in an evidentiary hearing. Coleman's counsel may well testify that, in light of other objectives, he would have called his client to the stand anyway. Even if he would not have called Coleman, it may be that Coleman's testimony was cumulative or did not contribute to the finding of any aggravating circumstance. If so, Coleman's testimony may have been harmless beyond a reasonable doubt. As for Coleman's counsel's decision to bring in evidence of Coleman's prior criminal activity, the district court might determine that the prosecutor likely would have submitted this evidence at the sentencing hearing anyway. Given this likelihood, Coleman's counsel may testify that he still would have elicited this information during Nank's cross-examination. Finally, there may have been no good reason for Coleman to challenge the trial judge. In short, there is no reason why the examples referred to by the majority could not be tested for harmless error in an evidentiary hearing. It may be that the State would fail in its burden of proving harmlessness beyond a reasonable doubt. Even so, the issue can and should be explored.

The problem here is analogous to that in many cases involving ineffective assistance of counsel claims. Such claims are disfavored when brought on direct appeal since "usually [they] cannot be advanced without the development of facts outside the original record." *United States v. Birges*, 723 F.2d 666, 670 (9th Cir.), *cert. denied*, 466



U.S. 943 (1984) and 469 U.S. 863 (1984), citing *United States v. Kazni*, 576 F.2d 238, 242 (9th Cir. 1978). For this reason, ineffective assistance claims are usually brought in habeas proceedings, see *United States v. Pope*, 841 F.2d 954, 958 (9th Cir. 1988), where an evidentiary hearing can be used to explore "what counsel did, why it was done, and what, if any, prejudice resulted." *Id.* (citation omitted). Similarly, whether the due process violation here was harmless beyond a reasonable doubt can be resolved by inquiring into Coleman's counsel's trial decisions at an evidentiary hearing.

*Tasco v. Butler*, 835 F.2d 1120 (5th Cir. 1988), also provides a useful parallel to this case. Tasco allegedly had received no notice of a recidivism charge filed against him under Louisiana's habitual offender statute until the day of the sentence enhancement hearing. Like Coleman, Tasco's federal habeas petition had been denied without an evidentiary hearing. *Id.* at 1122. The Fifth Circuit held that this alleged denial of notice would constitute a due process violation. *Id.* at 1123-24. The court then applied *Chapman's* harmless error doctrine to the violation, but concluded that "[t]he record in this case leaves us in doubt concerning whether the due process deprivation affected the outcome of the sentence-enhancement proceeding." *Id.* at 1124. Accordingly, the court reversed the denial of Tasco's petition and remanded to the district court for an evidentiary hearing to determine "when in fact Tasco and his attorney first received notice of the recidivism charges," and, if the notice was insufficient, "whether the state has shown beyond a reasonable doubt that [Tasco] suffered no prejudice as a result." *Id.* Similarly, I would order a remand here.



## II

Why, then, should we not remand for an evidentiary hearing? The majority suggests that per se reversal is appropriate. Rather than inquire into the reasons why the record, in its present state, will not yield an answer to the harmless-error inquiry, the majority exempts Coleman's claim from harmless-error review at all because of *the nature of the violation*.

I view as distinguishable those cases in which the Supreme Court has excepted particular constitutional errors from harmless-error review because the "scope of the violation . . . cannot be discerned from the record, [and therefore] any inquiry into its effect on the outcome of the case would be purely speculative." *Satterwhite v. Texas*, 108 S. Ct. 1792, 1797 (1988) (*Satterwhite*). The crucial characteristics of these cases appear to be (1) the scope of the violation cannot be determined from the record, and therefore (2) the effect of the violation on the outcome of the case cannot be determined. *See id.*

The cases usually included in this category are *Holloway v. Arkansas*, 435 U.S. 475 (1978) (*Holloway*) (conflict of interest in representation throughout entire proceeding), *Gideon v. Wainwright*, 372 U.S. 335 (1963) (*Gideon*) (total deprivation of counsel), and *Tumey v. Ohio*, 273 U.S. 510 (1927) (*Tumey*) (biased judge). *See Satterwhite*, 108 S. Ct. at 1797-98; *Van Arsdall*, 475 U.S. at 681-82. Before one can evaluate the differences between Coleman's due process infringement and the constitutional violations in *Holloway*, *Gideon*, and *Tumey*, however, it is necessary to understand the precise nature of the infringement in this case.

This case involves a novel type of due process claim. In challenging the retroactive application of a sentencing statute that resulted in his being resentenced to death, Coleman essentially is claiming that he was deprived of adequate notice. Maj. op. at 4699. Yet this case differs from *Marks v. United States*, 430 U.S. 188 (1977) (*Marks*) (fifth amendment due process clause), *Rabe v. Washington*, 405 U.S. 313 (1972) (per curiam) (*Rabe*) (fourteenth amendment due process clause), *Bowie v. City of Columbia*, 378 U.S. 347 (1964) (*Bowie*) (same), and *In re Oliver*, 333 U.S. 257 (1948) (*Oliver*) (same). Those cases hold that the due process clause guarantees the right to fair warning of what conduct or actions are subject to criminal liability. *Marks*, 430 U.S. at 191; *Bowie*, 378 U.S. at 354-55 ("When a[n] . . . unforeseeable state-court construction of a criminal statute is applied retroactively to subject a person to criminal liability for past conduct, the effect is to deprive him of due process of law in the sense of fair warning that his *contemplated conduct constitutes a crime.*") (emphasis added). *Marks*, *Rabe*, *Bowie*, and *Oliver* each disallowed the retrospective application of "[a]n unforeseeable judicial enlargement of a criminal statute." *Marks*, 430 U.S. at 192, quoting *Bowie*, 378 U.S. at 353. Here, by contrast, there is no question that Coleman had adequate notice of the conduct that constituted aggravated kidnapping under Montana law. He also had adequate notice that aggravated kidnapping carried the death penalty under Montana law, though the state's mandatory provision was later struck down. See Maj. op. at 4686. Coleman's notice of the resentencing procedures was also adequate to prepare for the resentencing hearing itself. See *Coleman v. Risley*, 839 F.2d 434, 451-54, 460-61 (9th Cir.)

(panel opinion), *reh. en banc granted*, 845 F.2d 884 (9th Cir. 1988). Thus, Coleman was deprived of adequate notice only in the following, limited sense: by not knowing that he would ultimately be subject to the 1977 sentencing statute, he did not have adequate notice that his *decisions at trial* might have an impact on his sentencing under the new scheme. The only reasons these trial decisions could possibly prejudice Coleman is the 1977 statute's directive that the sentencing judge consider any evidence, regardless of its content, which was admitted during the guilt phase. See Mont. Code Ann. § 95-2206.7.

Thus, aside from one exception I will analyze later, Coleman could have been prejudiced by the retrospective application of the sentencing statute only insofar as his lack of notice *was actually reflected in the state trial record*. That is, only if Coleman's counsel introduced damaging evidence into the record at trial could lack of notice have prejudiced Coleman at the sentencing hearing. Any trial decision resulting in the failure to introduce beneficial evidence at trial could not possibly have prejudiced Coleman's sentencing, because such evidence could have been introduced at the sentencing hearing. See *id.*

Bearing this in mind, I will now apply the *Satterwhite* analysis to consider whether this type of violation is one (A) whose scope cannot be determined from the record, and therefore (B) which has an effect on the case's "outcome" that cannot be determined beyond a reasonable doubt. 108 S. Ct. at 1797.

#### A.

*Tumey*, *Gideon*, and *Holloway* all involve violations whose scope is pervasive and cannot be determined from

the record. If a judge is biased as in *Tumey*, the bias will infect all of the judge's discretionary decisions made at trial. Similarly, the total denial of counsel as in *Gideon* will result in a record that bears little resemblance to the record which would have been created with representation. In either case, it would be virtually impossible to identify those portions of the record tainted by the violation. Moreover, there are other practical difficulties which these cases present. If a judge is truly biased, it would be fruitless to conduct an evidentiary hearing examining what the judge would have done without the bias. Similarly, where counsel has been denied, it may be impossible to know who the counsel would have been and what effect he or she would have had on the trial.

*Holloway* presents a slightly different situation, though it too is distinguishable from this case. In *Holloway*, the Court held that whenever a trial court improperly requires, over timely objection, an attorney to undertake joint representation of codefendants with conflicting interests, the error requires automatic reversal. 435 U.S. at 489-91. In so holding, the Court wrote:

In the normal case where a harmless-error rule is applied, the error occurs at trial and its scope is readily identifiable. Accordingly, the reviewing court can undertake with some confidence its relatively narrow task of assessing the likelihood that the error materially affected the deliberations of the jury. But in a case of joint representation of conflicting interests the evil – it bears repeating – is in what the advocate finds himself compelled to *refrain* from doing, not only at trial but also as to possible pretrial plea negotiations and in the sentencing process. It may be possible in some cases to identify from the record the prejudice resulting from an attorney's failure to undertake certain trial tasks, but even with a

record of the sentencing hearing available it would be difficult to judge intelligently the impact of a conflict on the attorney's representation of a client. And to assess the impact of a conflict of interests on the attorney's options, tactics, and decisions in plea negotiations would be virtually impossible.

*Id.* at 490-91 (citations omitted) (emphasis in original). Thus, *Holloway* turned in part on the fact that the conflict of interest would likely have an effect on unrecorded proceedings, such as plea negotiations. This is simply not the case here. Coleman could only have been prejudiced by the retrospective application of Montana's sentencing insofar as his lack of notice was actually reflected in the state trial court record.

In a more general sense, the error here had a more circumscribed and discernible impact on the record than the violations in *Holloway*, *Tumey*, and *Gideon*. The set of incentives faced by Coleman's counsel in the guilt phase roughly corresponded to those presented in the sentencing phase of the later-enacted sentencing scheme. His lack of knowledge regarding the new sentencing procedure could only have prejudiced his client if it resulted in his putting into the record evidence which would have either (1) supported the finding of an aggravating circumstance, or (2) weighed against the finding of a mitigating circumstance. *See* Mont. Code Ann. § 95-2206.10. Evidence favorable to Coleman which was omitted by counsel from the trial record could always be submitted later at the sentencing hearing. Thus, the scope of the violation here was more circumscribed and easier to discern from the record.



There is only one exception in which the state trial record would not be adequate: the majority's contention that Coleman would have challenged the trial judge had he known the trial judge would have the discretion to impose the death penalty. But if Coleman's counsel had serious doubts about the trial judge's fairness or impartiality, then he likely would have requested substitution anyway. The majority argues, however, that "[i]t is one thing to accept a judge for the purpose of conducting a fair trial, and quite another to accept that judge . . . to become the *sole decisionmaker* on the question of life or death." Maj. op. at 4698 (emphasis added). This argument overestimates both the amount of discretion accorded the sentencing judge under Montana law and the willingness of Coleman's counsel to endure a biased judge for the trial but not the sentencing phase. Furthermore, Coleman himself has never suggested to this court that he would have challenged the trial judge. Rather, this hypothetical scenario is a product of the majority's quest to conjure up ways in which Coleman might have been harmed. In my view, this contention's origin provides all the more reason why it should be tested at an evidentiary hearing. Such a hearing would supplement the trial record and provide an adequate basis for harmless error analysis of this contention. Just because Coleman's counsel *could* have challenged the trial judge without cause, *see* maj. op. at 4697-98, does not necessarily mean that we should automatically assume he would have done so, or that, had he done so, the outcome necessarily would have been different.

## B.

It might be argued that where the "outcome" is a death sentence, harmless error analysis is never applicable. The Supreme Court has rejected this view, and has repeatedly applied harmless error analysis to capital sentencing proceedings. E.g., *Satterwhite*, 108 S. Ct. at 1797-98; *Hitchcock v. Dugger*, 481 U.S. 393, 399 (1987) (reversing death sentence because there was constitutional error and state did not show error was harmless); *Skipper v. South Carolina*, 476 U.S. 1, 7-9 (1986) (*Skipper*) (implicitly rejecting idea in concluding that error was not harmless). In *Satterwhite*, the Court held that "a reviewing court can make an intelligent judgment about whether the erroneous admission of psychiatric testimony might have affected a capital sentencing jury." 108 S. Ct. at 1798. By contrast, *Skipper* evaluated the harmfulness of the exclusion of particular mitigating evidence from the capital sentencing phase. 476 U.S. at 7-8.

Turning to whether the "outcome" in this case can be determined beyond a reasonable doubt, I believe that Montana's sentencing procedure channels the sentencing judge's discretion in such a way that a reviewing court can evaluate the effect of Coleman's due process violation on the sentence imposed. The sentencing determination under Montana law is based on the presence or absence of statutorily defined mitigating and aggravating circumstances. Mont. Code Ann. § 95-2206.8-.9. Moreover, if the death penalty is imposed, the sentencing judge must make specific written findings of fact regarding the presence or absence of each of the aggravating and mitigating circumstances. Mont. Code Ann. § 95-2206.11. These findings must be "substantiated by the records of the trial



and the sentencing proceeding." *Id.* Under this regime, the impact of the error is more readily ascertainable than when the reviewing court must judge the error's impact on the jury's final, unexplained decision of guilty or innocent. Similarly, the impact under the Montana capital sentencing procedure is more easily determined than under proceedings in which a jury makes the capital sentencing determination without making specific written findings. See, e.g., *Satterwhite*, 108 S. Ct. at 1795, 1797-98 (applying harmless error review where capital sentencing jury answers two statutorily prescribed questions); *Skipper*, 476 U.S. at 2-3, 7-9 (implicitly applying harmless error review where capital sentencing jury returns final, unexplained decision whether to execute). If harmless error review could be applied under the schemes in *Satterwhite* and *Skipper*, then *a fortiori* we could apply it to the Montana procedure.

Moreover, this approach makes sense for one additional reason which is worth pointing out. Treating *ex-post-facto*-type due process violations as requiring automatic reversal would make little sense in light of *ex post facto* jurisprudence. Under that body of law, neither a procedural nor an ameliorative change in the law is actionable. *Dobbert v. Florida*, 432 U.S. 282, 292-97 (1977). Here, the change in the Montana law appears to have been both procedural and ameliorative. The determination under the *ex post facto* clause whether the challenged law is ameliorative is the functional equivalent of a harmless error analysis. Thus, under the *ex post facto* clause, as part of the inquiry into whether the right has been violated, courts examine whether the claimant was disadvantaged or harmed by the change in law. See 3 W.

LaFave & J. Israel, *Criminal Procedure* § 26.6 at 59 (1988 Supp.) (describing category of cases "characterized by a finding of prejudicial impact in the determination that there was a constitutional violation" and stating that "[w]here a court has made such a finding . . . (as where it concludes that counsel's representation was ineffective under the *Strickland* [*v. Washington*, 466 U.S. 668 (1984)] standard, or that nondisclosed exculpatory evidence was material under the [*United States v. Bagley*, 473 U.S. 667 (1985)] standard), then there is no reason to superimpose the *Chapman* standard to determine whether a new trial is necessary"). To allow litigants to repackage their *ex post facto* challenges to ameliorative laws as due process claims requiring per se reversal would in effect eliminate a significant limitation in *ex post facto* doctrine.

### III

For the foregoing reasons, I would hold that the due process violation in this case is subject to harmless error analysis. I express no opinion whether the error was in fact harmless beyond a reasonable doubt. I would remand to the district court for an evidentiary hearing.

REINHARDT, Circuit Judge, concurring:

Today, more than thirteen years after a state court levied an unconstitutional death sentence against Dewey Coleman, a federal court has invalidated that punishment. While the majority properly considers only one of Montana's unlawful acts, the fact remains that the state's prosecutors and courts committed a series of errors that are extraordinary both for their breadth and their

egregiousness.<sup>1</sup> The history of Montana's unrelenting effort to hang Dewey Coleman illustrates not only the failings of our legal system but also its saving graces. In a more perfect world, Dewey Coleman would not have lived under a death sentence for over a decade, and protracted litigation would not have sapped the limited resources of state and federal courts. In a less perfect world, a court system that had grown impatient with his numerous appeals would already have overseen Dewey Coleman's execution.

I write separately today not to repeat any of the arguments thoughtfully presented for the court by Judge Thompson. I concur without reservation in his opinion. I add my additional comments only in order to point out that the case of Dewey Coleman illustrates the fact that curtailing the federal habeas corpus procedures in death penalty cases would seriously undermine our system of justice and our commitment to constitutional values.

I.

In 1975, Coleman was sentenced to death for the crime of aggravated kidnapping. Constitutional error riddled the proceedings.<sup>2</sup> Despite glaring deficiencies, it was

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<sup>1</sup> See *Coleman v. Risley*, 839 F.2d 549, 615 (9th Cir. 1988) (Reinhardt, J., dissenting) (discussing those errors in detail).

<sup>2</sup> The constitutional problems can be roughly divided into four categories of error: the Equal Protection Clause, sentencing procedures, due process, and cruel and unusual punishment. First, Montana's decision to refuse plea bargaining and

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not until after thirteen years and thirteen court proceedings that we finally granted relief.<sup>3</sup> Dewey Coleman's

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seek a death sentence raises serious questions of racial bias and discriminatory intent concerning which Coleman has been unable to obtain an evidentiary hearing. While the State offered Coleman's white codefendant, a hardened criminal, a life sentence, Montana refused to negotiate in good-faith with Coleman – who is black – despite his lack of a criminal record or a violent past, the difficulty in prosecuting a case built almost entirely on the testimony of a confessed murderer, and substantial doubts as to his guilt. Second, during the capital sentencing phase, Coleman was denied an opportunity to present oral argument. The trial court, by formulating, writing, and distributing its final order prior to the sentencing hearing, abdicated its constitutional duty to provide the defendant a fair hearing. The trial court also unconstitutionally based Coleman's sentence on an unadjudicated offense. Third, Coleman was forced, by statute, to carry the burden of persuasion on the existence of mitigating circumstances and on the issue of whether these mitigating circumstances outweighed the aggravating circumstances, turning the normal method of proof on its head. Fourth, Coleman was ultimately sentenced to death under a new death penalty statute that was passed after he had been tried, convicted, and sentenced under an unconstitutional statute. See *Maj. op. passim*. Finally, an adjudication of guilt based only upon the dubious and self-interested testimony of a confessed murderer and the minimal physical evidence present here is constitutionally insufficient to support a capital sentence. See *Gardner v. Florida*, 430 U.S. 349 (1977) (plurality opinion). In sum, serious constitutional error affected almost every aspect of this case, from the passage of the initial Montana death penalty statute to the imposition of the current death sentence.

<sup>3</sup> Coleman was first convicted and sentenced to death by the Sixteenth District Court of Montana in 1975. The Montana Supreme Court vacated that sentence three years later. *State v.*

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experience is not atypical for a death row inmate seeking constitutional relief. Many prisoners spend more than a decade on death row before federal courts vindicate their years of litigation. *See infra* § III. These peripatetic passages through our legal system have raised serious questions about both habeas corpus and the practicality of the death penalty. Critics of the former have argued that the extended process undermines judicial finality and threatens the efficient functioning of the federal courts.<sup>4</sup> Some have even suggested that the writ be streamlined or abolished.

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*Coleman*, 579 P.2d 732 (1978) (Coleman I). On remand, Coleman was again sentenced to death. The Montana Supreme Court affirmed. *State v. Coleman*, 605 P.2d 1000 (1979) (Coleman II). After the United States Supreme Court's decision in *Sandstrom v. Montana*, 442 U.S. 510 (1979), the Montana Supreme Court reheard argument and again affirmed. *See* Coleman II. The United States Supreme Court denied certiorari. *Coleman v. Montana*, 446 U.S. 970 (1980). In early 1981, the Sixteenth District Court of Montana refused post-conviction relief. The Montana Supreme Court affirmed. *Coleman v. State*, 633 P.2d 624 (1981) (Coleman III). The United States Supreme Court denied certiorari. *Coleman v. Montana*, 455 U.S. 983 (1982). Thirteen months later, Montana's highest court rejected Coleman's state habeas corpus petition. *Coleman v. Risley*, 663 P.2d 1154 (1983). On August 9, 1985, the United States District Court denied Coleman's petition of habeas corpus. A divided three judge panel of this circuit affirmed. *Coleman v. Risley*, 839 F.2d 434 (9th Cir. 1988).

<sup>4</sup> The genesis of this hostility towards habeas appeals stems in part from a widely shared misperception of a habeas explosion. *See* Smith, *Title 28, § 2255 of the U.S. Code*, 40 Notre Dame Law. 171, 175-76 (1964) (listing filing statistics to demonstrate 'abuse' of the writ). Statistics do not support this picture

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I do not think that . . . [the Supreme Court] . . . can continue to evade some responsibility for this mockery of our criminal justice system. Perhaps out of a desire to avoid even the possibility of a "Bloody Assizes," this Court and the lower federal courts have converted the constitutional limits upon imposition of the death penalty by the States and the

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of a beleaguered federal judiciary. Since separate habeas statistics were first compiled in 1971, the number of claims per prisoner has steadily declined. Although growth in the overall prison population has off-set this per capita decline, there has also been a steady growth in the number of federal district court judges and magistrates. Over a long-term perspective – since 1944 – the burden on the federal courts of successive habeas petitions has increased, but "the rhetoric of the boom has outlasted the reality. . . .prisoner's habeas petitions have declined, and that decline began in the early 1970's, long before the major cases and rules restructuring habeas relief were in place." Resnick, *Tiers*, 57 So. Cal.L.Rev. 837,950 (1984). In 1971, at their peak, habeas petitions occupied over 12% of the federal docket; that number dwindled to 5% twelve years later. In addition, while 6.1% of all civil cases reach trial, only 2.4% of habeas cases proceed to the trial stage. *Id.* at 947, citing Annual Report of the Director of the Administrative Office of the United States Courts 60 (1982). Thus, the evidence does not support the portrait of a federal judicial system tottering under the weight of successive habeas papers. On the other hand, *death penalty* habeas cases raise questions of a different magnitude. The severity of capital punishment mandates greater scrutiny of the merits of death row appeals. Since questions of death penalty law often involve complex factual and doctrinal inquiries, death penalty petitions – unlike many other habeas cases – are more likely to survive motions to dismiss or other summary motions. Consequently, these complex questions, fueled by recent expansions in the death penalty, demand a significant amount of the federal courts' attention. *See infra* § IV.



Federal Government into arcane niceties which parallel the equity court practices described in Charles Dickens' "Bleak House".

*Coleman v. Balkcom*, 451 U.S. 949, 958 (1981) (Rehnquist, J., dissenting from denial of certiorari). I agree with Chief Justice Rehnquist that there are lessons to be gleaned from the federal habeas experience in death penalty cases; but because I believe that the substantial constitutional issues raised by defendants such as Dewey Coleman are much more than "arcane niceties", I would conclude that the mockery of our criminal justice system lies not in repetitive federal review but in the persistent disregard by our courts of fundamental constitutional rights.

## II.

No analysis of the habeas process is complete without consideration of its historical background. The story of the Writ of Habeas Corpus begins with the birth of the English Common Law. See C. Antieau, *The Practice of Extraordinary Remedies* 1 (1987). The Great Writ "is perhaps the most important writ known to the constitutional law of England, affording as it does a swift and imperative remedy in all cases of illegal restraint or confinement." *Secretary of State for Home Affairs v. O'Brien*, 1923 A.C. 603, 609 (H.L.). Its lineage in American jurisprudence is no less august, extending from the earliest days of colonial law through the Constitution<sup>5</sup> to modern

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<sup>5</sup> "The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in cases of Rebellion or Invasion the public Safety may require it." Art. I, § 9, cl. 2.

times. Although in form simply a method of procedure, the writ of habeas corpus has long stood as a bulwark against arbitrary and illegal imprisonment; "its history is inextricably intertwined with the growth of fundamental rights of personal liberty." *Fay v. Noia*, 372 U.S. 391, 401 (1963). In many ways, the history of the Great Writ is the history of constitutional liberty in this country.

The historical role of federal habeas review of state proceedings has been more limited. The contours of federal habeas jurisdiction were sketched in the first days of the new country but were not significantly expanded until the Judiciary Act of 1867.<sup>6</sup> The reach of the writ into state prisons has varied with the ebb and flow of Supreme Court jurisprudence. The *Noia* Court extended the Great Writ deep into state court adjudication, but recent cases have invoked procedural doctrine to bar certain claims in federal court. See, e.g., *Wainwright v. Sykes*, 433 U.S. 72 (1977) (adopting the cause and prejudice test for unlitigated state claims). These erosions of the Great Writ, however, have not robbed it of its essential value. "If the States withhold effective remedy, the federal courts have the power and the duty to provide it." *Noia*, 372 U.S. at 441. Habeas corpus process over state

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<sup>6</sup> The extent of this nineteenth century expansion has been hotly debated by courts, compare *Noia*, 372 U.S. at 415-19 with *Stone v. Powell*, 428 U.S. 465 (1976), and by academics, compare Peller, *In Defense of Federal Habeas Corpus Litigation*, 16 Harv. C.R. - C.L. L. Rev. (1982) (extended to the limits of the Constitution) with Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441 (1963) (limited to attacks on state court jurisdiction).

incarceration still stands as a basic safeguard of our liberties.<sup>7</sup>

### III.

While the historical role of the writ of habeas corpus illustrates its significance in American law, modern practice underscores the need for its continued vitality. Dewey Coleman's passage through the Montana judicial system symbolizes a problem plaguing death penalty litigation generally. Between 1976 and 1983, of the 41 death penalty cases decided by the Courts of Appeals on the merits, the prisoner prevailed 30 times, or almost 75% of the time. *Barefoot v. Estelle*, 463 U.S. 880, 915 (1983) (Marshall, J., dissenting). "This record establishes beyond any doubt that a very large proportion of federal habeas corpus appeals by prisoners on death row are meritorious, even though they present claims that have been unsuccessful in the state courts, that this Court in its discretion has decided not to review on certiorari, and that a federal district judge has rejected." *Id.* To protect the rights of capital defendants, the Supreme Court has erected a complex structure of procedural and substantive rules. However, these protections, often casually treated by state courts, would be rendered virtually meaningless if federal habeas were to disappear. The statistics show convincingly and the experience of Dewey Coleman illustrates that any curtailment of the writ of

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<sup>7</sup> Some of the most influential civil rights decisions of our time have resulted from habeas corpus petitions filed by state prisoners. See e.g., *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Malloy v. Hogan*, 378 U.S. 1 (1964)

habeas corpus would be tantamount to federal collaboration in a scheme to deny death row inmates their constitutional rights.

Critics have charged that the high rate of successful habeas appeals signals not an inability of state courts to adjudicate constitutional rights but rather heightened sensitivity of federal courts to death row inmates. While it is true that the federal courts scrutinize death penalty appeals more closely than other cases, the judiciary is doing nothing more than following established constitutional doctrine. "Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion). I find it troubling that the most determined attacks on the habeas process have come in an area of litigation where the stakes are so high, and the cost of error equals a man's life.

It is difficult to disagree with the Chief Justice that the results of death penalty litigation threaten to make a mockery of the criminal justice system. However, it is not frivolous appeals or complicitous judges that shake confidence in fair adjudication; rather, "it is difficult to avoid the suspicion that our criminal justice system impeaches its own integrity by producing reversible errors in between half and three-quarters of its [death penalty] cases." Burt, *Disorder in the Court: The Death Penalty and the Constitution*, 85 Mich. L. Rev. 1741, 1793 (1987). When

state court judges ignore fundamental principles of constitutional law,<sup>8</sup> the basic premises of the judicial system are shaken; the vast array of errors encourages speculation about the impartiality and detachment necessary to fair adjudication. This case is a prime example. The Montana Supreme Court had a number of opportunities to correct what amounts to a primer of constitutional error: race and equal protection, due process, cruel and unusual punishment. Yet, the majority of the court failed to do so and experienced little difficulty in rejecting Coleman's claims.<sup>9</sup> Given the unwillingness or inability of some

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<sup>8</sup> The high state court error rate stems from several sources. First, despite Justice Powell's protestations to the contrary, see *Stone v. Powell*, 428 U.S. at 493 n.35, experience suggests that federal courts stand in a better position to adjudicate constitutional rights. This may be a function of greater receptivity of federal courts to Supreme Court dictates, insulation from majoritarian pressures, and even superior technical competence. See generally Neuborne, *The Myth of Parity*, 90 Harv. L. Rev. 1105 (1977). The recent experience of California's Supreme Court forcefully shows that the system of direct election of judges can impose public opinion upon 'politically-neutral' constitutional interpretations. Second, mere redundancy of federal review of state imprisonment poses a formidable barrier to high error rates. Each successive decision diminishes the possibility of unconstitutional executions. For the mathematics of redundancy, see Cover & Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 Yale L.J. 1035, 1045 (1977).

<sup>9</sup> In *Coleman I*, the court, squarely faced with a recent controlling United States Supreme Court precedent, was compelled to correct an earlier constitutional violation in the initial sentence. 579 P.2d at 741-42. Thereafter, the Montana Supreme

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state courts to vindicate federal constitutional rights, habeas review of their judgments remains a necessary, as well as desirable, element of our federal system.

#### IV.

While disagreements over the death penalty habeas process continue to fester, both proponents and opponents of the death penalty agree on at least one issue, that death penalty litigation threatens effective administration of the law. Unlike many habeas cases which can be disposed of on the pleadings, *see supra* n.4, the gravity of capital cases coupled with the startling high rate of state error mandates intensive federal scrutiny. Dewey Coleman's case is again illustrative. Over seven years has passed since a habeas petition was docketed with the federal district court for Montana; both a three judge and an en banc panel of this court ultimately subjected his claims to intense review.<sup>10</sup> This single case tied up significant federal resources over the last seven years, and there are two hundred more potential death penalty litigants living on death row in California alone. Across the country, the number of potential petitioners has grown rapidly. At the beginning of 1985, there were 1420 inmates on

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Court had three opportunities to correct the fundamental constitutional errors raised in the habeas petition. In all three instances, the majority incorrectly denied relief.

<sup>10</sup> The majority and dissenting opinions of the three-judge panel cover 90 pages in the federal reporter. 839 F.2d at 434-523. While I am not certain that mere volume is a perfect indicia of the extent of judicial scrutiny, I suspect that there is, on some occasions at least, a basic correlation.



death row in the United States; by the end of the year, 171 prisoners had been added to the executioner's ledger. By March, 1987, 1,874 inmates languished on death row, an increase of approximately 32% over a 2½ year period. *See* Bureau of Justice Statistics, U.S. Department of Justice, Sourcebook of Criminal Justice Statistics 1986 at 428-29 (1987). This increase in the number of death row inmates will be reflected in the number of habeas petitions. In fiscal year (FY) 1988, the number of new death penalty cases entering the federal court system is estimated to be approximately 300. In FY 1989, an estimated 345 more death row inmates will file habeas petitions in the federal courts. In FY 1990, we can expect another 425 habeas petitions to flood the district courts. *See generally* Spangenberg Group, Time and Expense Analysis in Post-Conviction Death Penalty Cases (1988); Spangenberg Group, Caseload and Cost Projections for Federal Habeas Corpus Death Penalty Cases in FY 1988 and FY 1989 (1988).<sup>11</sup> Because of California's frequent invocation of the death penalty, the Ninth Circuit will bear a substantial part of the burden. An estimated 76 new death penalty cases will confront this court in 1989, and the number of the new entrants will rise to approximately 95 in 1990. *Id.* If we properly review these habeas petitions, we will be unable to handle our ordinary calendar of civil and criminal cases in an efficient and orderly manner.

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<sup>11</sup> The Spangenberg Group's projections of habeas corpus petitions in the federal court system derive from a 50 state survey of Attorney General's Offices and Public Defender's statistics. The estimates closely match the figures compiled by the NAACP.

Since it takes an average of over seven years from the date of sentencing to properly adjudicate a death penalty claim, collateral attacks on capital sentences will create a massive backlog in the federal system. Given the nature of the punishment and the high rate of state court errors, the federal courts must continue to scrutinize these cases with utmost care. But the costs of the fair and accurate adjudication mandated by the Constitution are extremely high; the limited capacities of the district and circuit courts will be challenged, and the ability of the federal system to handle the pressing business of other litigants will be diminished. As long as capital punishment is condoned in our country, extensive review of the death penalty must remain a priority of the federal courts, but, as the figures indicate, this mandatory review will exact a price in the impaired administration of our civil and criminal dockets.

## V.

In 1975, Dewey Coleman was sentenced to death; while state and federal courts debated the merits of his claim, he languished on death row for over thirteen years. A great deal of time, effort, and money, both public and private, has been expended, but the fact that this case has finally been adjudicated properly makes the process worthwhile.<sup>12</sup> I realize that there are other values – such

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<sup>12</sup> I am confident that the death penalty litigation in Coleman's case has now drawn to a close. Although the majority opinion properly does not reach the hypothetical question whether a new death sentence could be imposed if Coleman

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as finality – that are important to the judicial process, but when the stakes are a man's life, these values pale in comparison to accurate and fair adjudication. If cumbersome administration of the death penalty threatens efficient handling of all other civil and criminal matters, and some changes must therefore be made with respect to death penalty cases, the answer lies not in restricting legitimate appeals but in rethinking the social utility of the death penalty. Until legislatures reassess the wisdom of capital punishment<sup>13</sup>, exacting scrutiny of capital cases

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sought and obtained a new trial and was again convicted, I think the answer to the question is plain. As Judge Thompson eloquently writes for the en banc court, "Because Coleman had no reason to suspect that his decisions at trial would come back to haunt him at a sentencing hearing, we must conclude that he was denied due process when he was resentenced to death under Montana's revised death penalty statute." Majority Op. at 4699. The reasoning is necessarily applicable to any future death sentence imposed on Coleman for the crimes on which he has heretofore been tried. The record of the first trial can never be undone. Any future trial decisions Coleman would make would inevitably be affected by the trial record his counsel has already created.

<sup>13</sup> Among Western nations, retention of the death penalty is a rarity. In Western Europe, eight countries nominally keep death penalty statutes on the books. In five of those nations – Italy, Malta, Spain, Switzerland, and England – the laws permit capital sentences only for exceptional crimes, such as wartime treason. The other three – Belgium, Greece, and Ireland – retain the death penalty for ordinary homicide. But not one of the eight countries has executed a prisoner within the last decade. See Amnesty International, *Death Penalty List of Abolitionist and Retentionist Countries* (1988). Clearly, the process of reassessment has taken a different turn in other developed societies.

will continue to be the duty of the federal courts. And as long as state courts unconstitutionally sentence defendants to death, the only choice allowed by our laws is for the federal courts to put their judgments to the highest tests of the Constitution.<sup>14</sup>

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TROTT, Circuit Judge, joined by Circuit Judge THOMPSON, concurring:

Peggy Lee Harstad was viciously murdered on July 4, 1974. That this case is still being litigated over fourteen years later does not speak well of our system of justice. The prolongation of such a matter can only have the effect of preventing her family, friends, and community from coming to peace with this horrendous event—if that is possible. Litigants, too, deserve speedier results. All of us responsible for the anemic pace of justice should reflect on every ramification of this delay and rededicate ourselves to doing everything within our power to make sure that difficult and important decisions that are committed to us are made as expeditiously as possible. As Chief Judge Clark said in *Brogdon v. Butler*, 824 F.2d 338, 343 (5th Cir. 1987) (Clark, C.J., concurring), "Justice requires that in each instance capital punishment be imposed with maximum assurance of scrupulous legality.

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<sup>14</sup> It would, of course, be inappropriate to comment here on the recently enacted federal legislation which provides for the imposition of the death penalty in certain cases. See Title VII of the Anti-Drug Abuse Act, P.L. 100-690. No case has yet been decided under that statute.

But, justice equally demands an assurance that such punishment be imposed when the minds of men still retain memory of the crime committed."

I agree with Judge Reinhardt's assessment of the enormous and taxing death penalty workload that looms on the horizon. I respectfully disagree, however, that workload is a reason to rethink the social utility of the death penalty. Where it is the law, it represents the people's views expressed through democratic institutions regarding the appropriate punishment for the most heinous of criminal acts. Rather than surrender to the challenge of handling these difficult cases with judicious alacrity, I find it preferable to expand or streamline the system to handle the load.

I also must take issue with my colleague's statement that Montana's prosecutors and courts necessarily committed "a series of errors that are extraordinary for their breadth and egregiousness." It is useful to put this case in context to remember that Coleman at one point tried to plead guilty while simultaneously proclaiming he was the innocent victim of racial bias. Then, after the administration of "truth serum," a drug known on occasion to produce unreliable results, his attorney abruptly indicated Coleman was prepared to admit to his part in the kidnap, rape, and murder. With this series of events in mind, it is not appropriate to reject summarily a state prosecutor's explanation for his reluctance to accept a plea of guilty from a man who first said he was innocent, then in an abrupt, about-face apparently said he was guilty (after being given sodium amytal), and finally went to trial on the theory that he was blameless. Many

respected trial judges might well have declined to accept such a plea because of its obvious defects.

Had Montana accepted either of Coleman's pleas, it is clear beyond cavil that Coleman would have eventually mounted a collateral attack against his conviction, claiming an innocent black man under the influence of drugs had been coerced into pleading guilty and sent to jail for life for a crime he did not commit. Had he been successful in invalidating such a plea, Montana would have had to try Coleman years later with evidence that might have deteriorated beyond resurrection. Had Nank died or escaped in the interim, Montana's case might have been nonexistent, and Coleman might have escaped trial altogether. This would have been unacceptable. It is therefore not beyond understanding that the State refused to plea bargain and opted instead to go to trial.

Montana was under no obligation to plea bargain at all. See *Weatherford v. Bursey*, 429 U.S. 545, 561, 97 S.Ct. 837, 846, 51 L.Ed.2d 30 (1977). Also, a plea tendered pursuant to *North Carolina v. Alford*, 400 U.S. 37 (1970) will not stand—nor should it—without a strong factual basis and a clear showing that it was the product of a free will. Montana's Hobson's choice under these difficult circumstances to put its case before a jury, therefore, is hardly conclusive grounds for castigation. As the Supreme Court noted in *Singer v. United States*, 380 U.S. 24, 36, 85 S.Ct. 783, 790, 13 L.Ed.2d 630, 638 (1965), our Constitution regards a trial by jury as the best way to produce a fair result. The cruel and savage facts in this case also make it evident that Montana's selection of capital punishment falls short of shocking a reasonable



person's conscience. See *Burger v. Kemp*, 107 S.Ct. 3114 (1987).

I concur generally in Judge Thompson's analysis of the due process problem in this case, but only as it relates to the issue of Coleman's present sentence. Because of the procedures in place at the time of the commencement of Coleman's trial in October 1975, his counsel was required to make important tactical decisions without being able to gauge their impact on a nonexistent post-conviction death penalty hearing. Anyone familiar with death penalty cases knows the issues confronting defense counsel highlighted by Judge Thompson are real. This is not a matter of speculation. The law in Montana had not yet provided for a separate hearing on the issue of punishment and did not do so until 1977. It is for this reason that Coleman's sentence must be reversed.

Judge Wallace in his concurring and dissenting opinion makes a very strong case for an evidentiary hearing on the issue of whether the due process violation was harmless beyond a reasonable doubt. Were it not for the fact that Coleman's counsel himself brought Nank and Coleman's involvement in a robbery to the attention of the jury, I might agree. But this makes it virtually certain in my judgment that the error cannot be said to have been harmless beyond a reasonable doubt.

In one sense, this case is a victim of the turbulence generated in 1972 by *Furman*. New procedural guidelines for the administration of capital punishment were mandated. Virtually every state where capital punishment was on the books, including Montana, had to amend its laws to conform to the new rules. This took time. The

choices were difficult, the drafting complex. The Supreme Court provided little guidance. Many cases, including this one, suffered as a consequence. That the path is difficult, however, is not sufficient reason to abandon a constitutional avenue chosen by the people. As an ancient Greek philosopher once said, "It is a painful thing to look at your own trouble and know that you yourself and no one else had made it." Sophocles, *Ajax* (c.447 B.C.)(John Moore trans.).

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ALARCON, Circuit Judge, concerning in part and dissenting in part:

I concur in that portion of the majority's opinion that holds that the record does not support Mr. Dewey Coleman's claim of a violation of his right to an impartial jury at the guilt phase of his trial. I dissent from the majority's conclusion that Mr. Coleman's claim, that he was selected for prosecution and convicted solely because he is a black man, need not be resolved in this appeal. If Mr. Coleman was selected for prosecution and convicted in violation of his right to equal protection, any question concerning the validity of the punishment later imposed by the sentencing court would clearly be moot. The majority has not explained why it determined that it was required to reach Mr. Coleman's contention that the jury that *convicted* him was improperly selected while, at the same time, apparently concluding that it was unnecessary to decide the remainder of his constitutional challenges to the *guilt* phase of the trial.

## I

Mr. Coleman, a black man, has asked this court to order the district court to grant him an evidentiary hearing so that he may offer evidence in support of his contention that he was invidiously subjected to selective prosecution, represented by ineffective counsel, and convicted of three crimes based upon legally insufficient evidence, notwithstanding his innocence, in violation of his federal constitutional rights. In a brief and enigmatic footnote, the majority has expressly declined to review the merits of these serious constitutional challenges, which, if true, should entitle him to a new trial if not immediate freedom from further incarceration. The majority appears to have ignored the Supreme Court's instruction that in considering a capital case "the severity of the sentence mandates careful scrutiny in the review of *any colorable claim of error*." *Zant v. Stephens*, 462 U.S. 862, 885 (1983)(emphasis added). Because I believe that the failure of the majority to determine the merits of each of Mr. Coleman's allegations of grave constitutional error concerning the *guilt* phase of his trial may result in the continued confinement of a state prisoner – who may be innocent – for the rest of his life, I cannot join in the majority's advisory opinion concerning the validity of the punishment imposed for the commission of *one* of these crimes.

## II

Over thirteen years ago, Mr. Coleman was convicted by a Montana jury of deliberate homicide, aggravated kidnapping, and sexual intercourse without consent, with

bodily injury (forcible rape). He is presently serving a sentence of 100 years for deliberate homicide and a consecutive sentence of 20 years for forcible rape. *Coleman II*, 185 Mont. 299, 605 P.2d 1000,1007 (1979). He also received a sentence of death for the crime of aggravated kidnapping.

Mr. Coleman claims that he is innocent and was selected for prosecution and convicted solely because he is black. The Montana courts refused to grant Mr. Coleman an opportunity to prove that he is the victim of selective prosecution and other serious constitutional violations which if true, would compel reversal of his convictions and the restoration of his freedom. Having exhausted his state remedies, Mr. Coleman exercised his rights under 18 U.S.C. § 2254 to petition the federal courts to hear his evidence that he was selected for prosecution and convicted solely because he is a black man.

The district court dismissed Mr. Coleman's petition without a hearing. A three-judge panel of this court heard Mr. Coleman's appeal from the denial of his petition for a writ of habeas corpus. Two of the judges concluded that the record failed to support Mr. Coleman's contention that "he was tried, convicted, and sentenced to death as a result of pervasive racial discrimination." *Coleman v. Risle*y, 839 F.2d 434, 450 (9th Cir. 1988). Our dissenting colleague was of the view that Mr. Coleman was "entitled at the least, to a full and fair hearing on [the equal protection claim] in the district court." *Id.* at 482. In a subsequent passage, the dissent argued that "where the defendant establishes a prima facie case of racial discrimination, we have an obligation to conduct a hearing and probe the motives of the prosecution." *Id.* at 483.

Mr. Coleman petitioned for a rehearing and suggested that such reconsideration should be conducted by an en banc panel of this court. He again argued that the record of the state court proceedings amply demonstrated that he was entitled to an evidentiary hearing to prove that he was selected for prosecution and convicted because he is black. We granted rehearing en banc.

In its opinion, the en banc majority has failed to determine the merits of Mr. Coleman's contention that he is entitled to an evidentiary hearing to prove he was selected for prosecution and convicted solely because of his race. Instead the majority has limited its review to a discussion of the validity of the jury selection process and the punishment imposed as the result of Mr. Coleman's conviction for the crime of aggravated kidnapping. The majority has also failed to address Mr. Coleman's remaining constitutional attacks on his *convictions* for aggravated kidnapping, deliberate homicide and forcible rape.

In refusing to consider the constitutional integrity of Mr. Coleman's convictions for deliberate homicide and forcible rape, the majority appears to have blinded itself to the fact that the prisoner was sentenced to serve 120 years for these offenses and that he seeks an evidentiary hearing in the district court so that he can demonstrate that the Montana court's judgment on the issue of guilt must be set aside.

### III

Mr. Coleman attacks the validity of his *convictions* for deliberate homicide, aggravated homicide, and forcible rape on the following grounds:

One. The evidence produced at trial was insufficient to convince a rational jury of Mr. Coleman's connection to the rape and murder of Peggy Lee Harstad. "A black man who has consistently maintained his innocence has been condemned to death, time after time, solely on the uncorroborated and incredible testimony of a white alleged accomplice who purchased his own life with his testimony." Appellant's Opening Brief, page 48. In his amended petition for a writ of habeas corpus, Mr. Coleman also challenges the trial court's failure to rule on his objection to the accomplice's mental competency to testify at the *guilt* phase of the trial.

Two. He was denied the effective assistance of counsel. Mr. Coleman asserts that without his knowledge or consent, his first defense attorney told the trial judge that truth serum tests had revealed that his client was guilty. "[T]his information must have colored not only the trial court's view of the nature and extent of Coleman's guilt, but, when coupled with Coleman's extensive trial testimony protesting his innocence, must have led the trial court to conclude that Coleman was both a murderer and a perjurer." Appellant's Opening Brief, page 23. (emphasis added). See Appellant's Opening Brief, page 30 n.1.

Three. Mr. Coleman contends that he "was tried, convicted, and sentenced as a result of pervasive racial discrimination." Appellant's Opening Brief, page 47 (emphasis added). He argues that the trial judge's reference to Mr. Coleman as "this black boy" demonstrates racial discrimination compelling reversal of the judgment of conviction of each crime. Appellant's Opening Brief, page 47.

The majority's sole response to these constitutional challenges to the validity of the judgment of *conviction* for aggravated kidnapping, deliberate homicide, and forcible rape is contained in footnote 9 of its opinion. The majority offers the following explanation for its failure to



review these colorable constitutional claims concerning the validity of the *guilt* phase of his trial:

Coleman's contention that he was prosecuted and sentenced to death, because of race discrimination when that state plea bargained with Nank, a white man, but refused to enter into a plea bargain with Coleman, who is black, does not impact his conviction of deliberate homicide. He would have been convicted upon his offer to plead guilty to this crime in any event.

Thus the majority has chosen to ignore Mr. Coleman's claim that, notwithstanding his innocence, he was selected for prosecution solely because he is black.

If Mr. Coleman was selected for prosecution as the result of invidious discrimination based on his race, a plea resulting from the state's violation of his constitutional rights would be tainted and invalid. Contrary to the majority's conclusion, proof that the prosecution of Mr. Coleman was animated by racial discrimination would clearly "impact his conviction."

The majority has not cited any authority for its extraordinary assumption that a state prisoner whose offer to plead guilty was rejected, may be denied his right to an evidentiary hearing in order to prove that he was selected for prosecution solely because of the immutable fact that he is black. The fact that a person once offered to plead guilty to avoid the death penalty should not bar him from proving that he was selected for prosecution because of his race, especially in a case where it is alleged that the *rejection of his offer* is at least *prima facie* proof of racial bias.

The majority speculates in footnote 9 that if Mr. Coleman had entered a plea of guilty under the circumstances reflected in the record, it would have passed careful constitutional scrutiny. Without exposing its rationale, the majority appears to assume that a plea of guilty, by a person who was the victim of selective prosecution and injected with sodium amytol [sic] while in custody, is valid. I cannot agree. To validate a plea under such circumstances would reward outrageous governmental conduct in clear violation of a state prisoner's rights to due process and equal protection.

I recognize that the Supreme Court has held that a trial judge may accept a guilty plea from a person who informs the court that he is innocent but wishes to avoid the extreme penalty. *North Carolina v. Alford*, 400 U.S. 25, 37 (1970). There was no claim in *Alford*, however, that the prisoner had been selected for prosecution because of his race and had received ineffective assistance of counsel. No showing was made in *Alford* that the plea of guilty was constitutionally invalid on any ground. It should also be noted that the Supreme Court cautioned in *Alford* that its holding "does not mean that a trial judge must accept every constitutionally valid guilty plea merely because a defendant wishes so to plead." *Id.* at 38.

Assuming the truth of Mr. Coleman's allegations, as we must in this appeal, it would have been improper for the state of Montana to have accepted Mr. Coleman's plea of guilty if he was selected for prosecution in violation of his federal constitutional rights. Furthermore, the evidence is undisputed that Mr. Coleman's offer to plead guilty followed an alteration of his memory by the state concerning his participation in the crimes charged against

him as a result of an injection of sodium amytol [sic]. Long ago, in *Townsend v. Sain*, 372 U.S. 293 (1963), the Supreme Court observed that a confession of guilt that is drug induced would be involuntary. *Id.* at 307-309. I seriously doubt that any of my colleagues would uphold a guilty plea obtained under such circumstances.

In footnote 9, the majority also states: "Until Coleman is resentenced, we cannot evaluate the merits of his claim of race discrimination based upon the State's refusal to plea bargain with him as it did Nank." The majority does not inform us why it cannot "evaluate" the merits of the claim of racial discrimination prior to resentencing. We have jurisdiction over this matter under section 2254. The federal constitutional claims are ripe for review. If these claims are valid, the majority has a duty to "evaluate" and invalidate the conviction now. There can be no valid sentence for a conviction based on invidious discrimination.

In the passage quoted in the preceding paragraph, the majority appears to suggest, albeit with delicate subtlety, that Mr. Coleman's claims of invidious selective prosecution, may possibly survive this appeal if this court is dissatisfied for unexplained reasons with the sentence imposed by the trial court for aggravated kidnapping or the treatment Montana gives to the *conviction* for that crime<sup>1</sup>. Does the majority mean by this puzzling comment

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<sup>1</sup> The majority appears to have affirmed *sub silentio* the district court's dismissal of his claims that he was denied effective counsel and that he was convicted in clear violation of Montana law on the uncorroborated testimony of a mentally incompetent accomplice. The majority does not suggest that it will evaluate the merits of these claims after Mr. Coleman is resentenced.

that Mr. Coleman may return to the district court with a new petition for habeas corpus relief limited to the *sentence* "other than death" imposed by the Montana trial court upon remand for the crime of aggravated kidnapping? Or, instead, is the majority suggesting that Mr. Coleman may file an untimely petition for a rehearing in this court for a review of the judgment of *conviction* for aggravated kidnapping *limited to the claim of invidious discrimination*, if Montana's treatment of this conviction falls below the majority's undisclosed expectations? It should also be noted that because the remand is solely for resentencing for aggravated kidnapping, the State of Montana is under no duty, under the majority's mandate, to "treat" further the judgment of *conviction* for any of the crimes for which Mr. Coleman stands convicted.

I do not understand the majority's reluctance to face up to Mr. Coleman's constitutional attack on the judgment of *conviction* for aggravated kidnapping, deliberate homicide, and forcible rape in the appeal presently before this court. If Mr. Coleman has stated sufficient facts to show that these convictions were obtained in violation of his constitutional rights, he is entitled to an evidentiary hearing in the district court now. The treatment Montana may give the *sentence* for aggravated kidnapping upon remand has no bearing on the validity of Mr. Coleman's challenge to his *convictions* for aggravated kidnapping, deliberate homicide or forcible rape. Let us assume that upon remand Montana requests and is granted a dismissal of the aggravated kidnapping charge. In that event, has the majority concluded, by its concern over how Montana will "treat" the aggravated kidnapping charge, that Mr. Coleman should spend the rest of his life

in prison on the remaining charges, without further federal review, notwithstanding the fact that he has alleged that he is the victim of invidious selective prosecution because he is black, that he received ineffective assistance of counsel at the guilt phase of the trial, and that the evidence supporting his conviction is based on the testimony of an uncorroborated and mentally incompetent accomplice? Mr. Coleman has spent over thirteen years in custody. He is entitled to his freedom now if he can prove the truth of these allegations without regard to Montana's treatment of the aggravated kidnapping charge.

In footnote 9, the majority attempts to justify its failure to confront Mr. Coleman's serious constitutional challenges to his convictions with the curious comment that "there is a strong practical possibility that today's decision upholding one of Coleman's principal constitutional arguments will serve ultimately to make it unnecessary for us to consider Coleman's remaining claims." Majority Opinion, page 4702-03 n.9. Nothing in the record, the many briefs that have been filed in this matter, or the arguments of Mr. Coleman's counsel support the majority's speculation that he will abandon his claim that he is an innocent black man victimized by racial discrimination if the sentence imposed for aggravated kidnapping is reversed.<sup>2</sup>

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<sup>2</sup> If the majority's efforts at mind reading prove to be accurate, it may have discovered a calendar clearing procedure I will label "appellate sentence bargaining," in which a state prisoner is induced to abandon meritorious federal constitutional challenges to the guilt phase of the trial in exchange for a sentence "other than death."

The majority persists in ignoring the fact that if Mr. Coleman was the victim of invidious selective prosecution, his conviction for aggravated kidnapping is invalid. If so, any sentence, whether life or death, must also be set aside.

The majority has avoided deciding hard constitutional questions properly before it concerning the validity of the convictions and has purported to resolve a *sentencing* issue it has no jurisdiction to reach if selective *prosecution* on racial grounds has been demonstrated.

In 1981, Justice Morrison of the Montana Supreme Court made the following comment about this case:

The majority has one salutary aspect. It has finally freed Coleman from the yoke of the state court system and permits him to pursue his claims in federal court. A federal court cannot help but be more receptive to the important questions that Coleman has raised but this court has turned down by wholesale and summary disposition. I cannot conceive that this case will leave a federal court with the abiding conviction that justice was done.

*Coleman v. State*, 633 P.2d 624, 666 (1981) (Morrison, J., dissenting).

Unfortunately, Justice Morrison was wrong. This case will be returned to Montana by the federal court system without discussing or resolving Mr. Coleman's claim that his convictions must be set aside because of selective prosecution, ineffectiveness of counsel, and legal insufficiency of the evidence to convince a rational trier of fact of his guilt beyond a reasonable doubt.



I would not want the task of explaining to Mr. Coleman that his federal constitutional challenges to his *convictions* for aggravated kidnapping, deliberate homicide, and forcible rape will not be reached by this court because "there is a strong practical possibility" that he will give up his claim that an innocent man was selected for prosecution because he is black in view of the fact that the majority reversed the *sentence* imposed for aggravated kidnapping. A prisoner who forcefully has proclaimed his innocence for over thirteen years, condemned to be imprisoned for the remainder of his life, might be forgiven if he suppresses his enthusiasm for the majority's imaginative interpretation of Mr. Coleman's undisclosed goals in this litigation.

#### IV

The court's disposition of this appeal is also unfair to the State of Montana. The majority has reversed the sentence of death for the crime of aggravated kidnapping because, at the trial on the issue of guilt, Mr. Coleman's defense counsel introduced evidence that his client participated in an uncharged burglary. Instead of ordering that a new trial be conducted so that Montana can attempt to prove, after an error-free trial, that the extreme penalty is warranted, the majority has reversed the sentence of death; ordered a punishment "other than death"; ruled against Mr. Coleman's challenge to the jury that *convicted* him; and implicitly affirmed the denial of an evidentiary hearing on his remaining constitutional claims that clearly "impact" on his *convictions* of each offense. Thus, with the same brushstroke, the majority has denied Mr. Coleman the opportunity to prove that he

is entitled to his freedom from the threat of any further incarceration on the aggravated kidnapping charge, not merely a punishment "other than death," and interfered with Montana's right under the police powers expressly reserved to the states by our federal constitution, to impose the death penalty for this offense.

The majority has not explained why it has denied to Montana the opportunity to seek the death penalty upon remand under circumstances free of constitutional error. In footnote 7, the majority expressly declines to reach the question whether a state prisoner who was sentenced under a constitutionally defective statute can receive a death sentence under a law enacted after his conviction. Nevertheless, without explanation or citation to the source of its authority, the majority has decreed that the State of Montana may not again impose the death penalty in this case.

If the majority has silently concluded that a state may not resentence a condemned person under a statute enacted after his or her conviction, I respectfully suggest that this important constitutional issue is deserving of thoughtful discussion and critical analysis. Instead, while the opinion carefully explains in footnote 7 that this issue will not be reached, the majority proceeds without explanation to enter an order that denies *ex post facto* effect to a death penalty statute. Proper respect for comity and "our federalism" demands that we act with appropriate restraint and sensitivity, and set forth a principled explanation, when we deny to a state the right to follow its own public policy in selecting the appropriate punishment that should be imposed for a violation of its criminal code. See *Rummel v. Estelle*, 445 U.S. 263, 274 (1980)

("one could argue without fear of contradiction by any decision of this Court that for crimes concededly classified and classifiable as felonies, . . . the length of the sentence actually imposed is purely a matter of legislative prerogative.") I regret that the majority has declined to offer any justification for its casual treatment of this grave constitutional question.

### CONCLUSION

Once again, Mr. Coleman has been denied a decision on the merits of his serious allegations of racial discrimination against the State of Montana in selecting him for prosecution of aggravated kidnapping, deliberate homicide, and forcible rape. After thirteen years in custody, Mr. Coleman has the right to be told *now* whether the majority believes that he is entitled to an evidentiary hearing to test the constitutional validity of the guilt phase of his trial.

The Supreme Court has instructed federal courts that colorable claims of constitutional error must be given careful scrutiny in a capital case. *Zant*, 462 U.S. at 885. Inexplicably, the majority has concluded that it has no duty whatsoever to scrutinize Mr. Coleman's claims of selective prosecution against an innocent black man, ineffectiveness of counsel at the guilt phase of the trial proceedings, and a denial of due process based on the legal insufficiency of the evidence to support his conviction.

The majority appears to have concluded that Mr. Coleman will be willing to abandon his claim that he was *convicted* of deliberate homicide and forcible rape in violation of several of his constitutional rights in view of its

determination that Montana cannot exact the death penalty in this case. I have read the briefs and heard the oral arguments in this matter. I can find no clue that Mr. Coleman's thirteen-year challenge to his *conviction* of each offense has been a clever tactical ploy and that his only goal has been to avoid the death penalty.

Because this is an en banc proceeding, further review of Mr. Coleman's claims before this court in this appeal is unlikely. If the majority has misjudged Mr. Coleman's intentions, he must now seek relief from the United States Supreme Court. If so, the Supreme Court undoubtedly will summarily remand this matter with directions that we exercise our appellate responsibility to decide whether Mr. Coleman has stated sufficient facts which, if true, require that the judgment of conviction be set aside because he is the victim of selective prosecution, he was ineffectively represented at the guilt phase of his trial and the evidence of his guilt is legally insufficient.

Montana may also elect to seek review of the majority's conclusion that it can vacate a sentence of death and bar its reimposition, without determining the constitutionality of Montana's capital punishment statute or offering an explanation of the source of its power to limit the state court's discretion.

The unprecedented procedure adopted by the majority for this appeal has denied Mr. Coleman his right under section 2254 to a review of his federal constitutional challenges to the guilt phase of his trial. The majority has also exceeded its limited jurisdiction by purporting to deny to Montana its right to select the appropriate punishment, consistent with the eighth

amendment, for violation of its laws. Because I am persuaded that we cannot ignore any of the colorable constitutional challenges to Mr. Coleman's convictions presented in this appeal in the manner suggested by my colleagues, I respectfully decline to join in their number.

I would first determine whether each of the convictions should stand before discussing the validity of sentences imposed by the court. If each of the convictions must be reversed because of invidious selective prosecution, ineffectiveness of counsel, or the legal insufficiency of the evidence, the issue of punishment for any offense becomes moot, and a discussion thereof becomes advisory and beyond our limited jurisdiction.

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**APPENDIX B**  
**FOR PUBLICATION**  
**UNITED STATES COURT OF APPEALS**  
**FOR THE NINTH CIRCUIT**

DEWEY E. COLEMAN,	)	
<i>Petitioner-Appellant,</i>	)	No. 85-4242
	)	
v.	)	D.C. No.
	)	CV-81-272-BLG
HENRY RISLEY, Warden, Mon-	)	
tana State Prison, and	)	OPINION AND
MICHAEL T. GREELEY, [sic]	)	DISSENT*
Attorney General for the	)	
State of Montana,	)	
<i>Respondent-Appellees.</i>	)	

Appeal from the United States District Court  
for the District of Montana

James F. Battin, District Judge, Presiding

Argued and Submitted

May 7, 1986 - Portland, Oregon

Filed January 19, 1988

Before: Arthur L. Alarcon, Stephen Reinhardt and  
David R. Thompson, Circuit Judges.

Opinion by Judge Thompson; Dissent by Judge Reinhardt

**COUNSEL**

Henry T. Greely, Stanford Law School, Stanford, California, for the petitioner-appellant.

James M. Scheier, Assistant Attorney General, State of Montana, Helena, Montana, for the respondents-appellees.

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\*This is the first of two booklets; see page 613 for Judge Reinhardt's dissent.



OPINION

THOMPSON, Circuit Judge:

Dewey E. Coleman, a Montana state prisoner who has been sentenced to death, appeals from the district court's denial of his petition for a writ of habeas corpus under 28 U.S.C. § 2254. We affirm.

I

FACTS

On July 4, 1974, Peggy Lee Harstad, twenty-one years old, disappeared while driving alone from Harlowton to Rosebud, Montana. The next day her car was found within a few miles of her home, near Rosebud. Several days later, a ranch hand discovered her purse inside a culvert about ten miles from her abandoned car. In the investigation which followed, an elderly couple reported that on the evening Harstad disappeared they had seen a black man and a white man hitchhiking between Roundup and Forsyth, Montana at about the time Harstad had been driving between those towns. The two men were identified as Dewey Eugene Coleman, a black man, and Robert Dennis Nank, a white man.

On July 9, 1974, representatives of the Rosebud County sheriff's office questioned Nank. He admitted being in the area where Harstad had last been seen alive, and hitchhiking through Forsyth, Montana on the evening of July 4th. In an interview with FBI agents about one month later, Nank also admitted seeing the Harstad vehicle abandoned on the road and finding a purse along the road where he and Coleman had been hitchhiking. By

this time the FBI had reported a positive comparison between Coleman's fingerprint and a fingerprint which had been lifted from a paper found in Harstad's purse. Vacuumings taken from the Harstad vehicle revealed Negroid head hairs and two Negroid pubic hairs.

On August 29th, almost two months after her disappearance, Harstad's body was found on the north bank of the Yellowstone River, just west of Forsyth, Montana. Because of decomposition of her remains, a cause of death could not be determined.

Nank and Coleman were arrested in Boise, Idaho in October, 1974 and charged with deliberate homicide in the death of Peggy Lee Harstad. During questioning Nank gave a full confession implicating himself and Coleman in the kidnap, rape and murder of Harstad. Coleman denied any involvement in the crimes. The apartment where Nank and Coleman lived was searched, as was their car. Two motorcycle helmets and a rope Nank said had been used in the crimes were recovered. Coleman and Nank were charged with deliberate homicide, aggravated kidnapping, and sexual intercourse without consent. A conviction of aggravated kidnapping carried with it a mandatory death sentence. Mont. Code Ann. § 94-5-304 (1947) (repealed 1977).

On May 7, 1975, Nank entered into a written plea agreement with the State. He agreed to plead guilty to deliberate homicide and solicitation to commit sexual intercourse and to testify against Coleman in return for dismissal of the aggravated kidnapping charge; the dismissal of the aggravated kidnapping charge was not to occur until after Nank had testified at Coleman's trial.

Coleman's counsel entered into plea bargaining discussions. Coleman insisted on maintaining his innocence, however, and was unable to make a plea agreement with the State.

On July 2, 1975, a pretrial hearing was held on a motion brought by Coleman's counsel seeking to obtain a court order authorizing the copying of Nank's medical records. Coleman was not present at the hearing. His counsel explained that Coleman had been taken to Billings, Montana for a sodium amytal examination to see if he could remember the events of July 4, 1974. During the course of the hearing, Coleman's counsel stated he wanted to enter into further plea negotiations with the State. The following colloquy occurred:

Defense Counsel: I want to enter into further plea bargaining with the State and with the Court. . . . Also what I have to say today, I have not confirmed with my client, but I believe because of the shortness of time between now and the time of trial, it should be raised. . . . My client - well, also I want to proceed on the basis that this is plea bargaining and things I should say should not be held against my client at some later time. Is that understood?

State's Attorney:

I don't go for that at all. I think we're either presenting an argument here. If we're going to hold

a plea bargaining conference, let's do that later. . . .

The Court:

I think that what he's doing is laying a foundation to bring something up. Now go ahead.

Defense Counsel:

That's correct. I'll go forward. I don't believe that my statements can be used against my client in any event. The purpose of the psychiatric examination was to place my client under sodium amytal to see if his recollection and memory could be refreshed, because in all communications with me, he could not tell me what happened. He continually asserted his innocence and it presented quite a problem in trying to defend him. That was the purpose, to send him to Dr. Harr to have him placed under sodium amytal. That investigation has been conducted and I believe on the basis of that examination, that my client will want to enter a plea of guilty.

The Court:

Without the condition of -

Defense Counsel:

Without the assertion of innocence. Now these statements I make are based on conversations I had with my client prior to the

time he went up for the examination. That if the examination revealed certain things that refreshed his memory and indicated that the story that Nank was telling was in fact true, or substantially true, that then my position would be that we should go back to the Court and offer to enter a plea with the understanding that the death penalty not be imposed, and then if the memory is refreshed and his recollection of events is sustained after the sodium amytal has worn off, that then he would testify fully as to what his extent of participation was in the crime, and to avoid what I thought was the prosecution's most severe objection, and that is that he was entering a plea and saying he was innocent, and that this would allow him to get out. Now I know that the State indicated before that they thought he should be hung. I don't know what the State's position is. Now Mr. Coleman will be returning to Miles City, according to Dr. Harr, sometime around eleven o'clock. I intended to immediately confer with him.

Doctor Harr has called me already this morning and from the information I have received, it appears that my client's memory has been refreshed and there was participation on his part in the crime. Therefore, my function I believe, is to try to accomplish and make arrangements with the State and with the Court to save my man's life, and also it presents a personal problem and personal dilemma to me that would mean if we have to continue with the trial with my feelings of what Dr. Harr told me, and that if that's true, it will be very difficult to continue in the defense and to argue the case. Now that's a personal dilemma that I have.

The Court:

That may be a personal dilemma, but it's an obligation that you'll have to go through with. So your client now makes the same proposition to the State as Nank has?

Defense Counsel:

Yes, he would.

No agreement or understanding was reached at the July 2nd hearing. When court was convened the next day, Coleman was present. His counsel referred to the sodium amytal examination and stated that Coleman would plead guilty "under the same terms and conditions as has



been accepted by the State with regard to Mr. Nank." The State refused to accept from Coleman the same plea bargain which had been made with Nank. The prosecutor stated he was concerned about Coleman challenging the voluntariness of his plea at a later time. He stated there were circumstances in Coleman's case which made it significantly different from Nank's. He stated these included the fact that claims had been made in Coleman's case that his attorney was incompetent and that a change of venue to avoid prejudice had not been a sufficient change to avoid such prejudice. He also pointed to Coleman's previous assertion of an insanity defense (which Coleman had later waived), and to the possibly unreliable sodium amytal procedure which had prompted Coleman to offer a guilty plea.

When Coleman's proposed plea bargain was rejected by the state, his counsel requested to be relieved. He stated that although he could defend Coleman on the aggravated kidnapping charge, there was "no way in the world I can state to the jury that he is innocent of deliberate homicide and that he's innocent of sexual intercourse without consent." The trial court denied the motion, but the Montana supreme court subsequently relieved Coleman's counsel and appointed new counsel to represent him. Coleman's new counsel took over his representation unaware of the proceedings which had taken place on July 2 and 3.<sup>1</sup>

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<sup>1</sup> The new counsel did not obtain a transcript of the July 2 and July 3, 1975 hearings until February 1982. See *Coleman v. Risley*, 663 P.2d 1154, 1158 (Mont. 1983) (*Coleman IV*). Coleman's habeas corpus petition was filed in the United States district court in November 1981.

Trial began in October 1975. Coleman and Nank both testified. They had met one another at the Veterans Hospital in Sheridan, Wyoming. Coleman was being treated for depression. Nank had a history of mental illness. They were discharged from the Veterans Hospital and traveled to Montana on Nank's motorcycle. They ran out of gas between Roundup and Forsyth during the evening hours of July 4, 1974 and decided to hitchhike. From this point on their stories differed.

Coleman testified that he and Nank had been unsuccessful in their attempt to hitchhike, but that Nank was able to obtain a ride for himself and headed toward Forsyth. Nank returned several hours later driving a car subsequently identified as Harstad's. He told Coleman he had killed a woman, and asked Coleman to hide a woman's purse which he had brought back; Coleman complied. Coleman denied any involvement in the death and maintained he did not report Nank to the authorities because he was afraid of retribution from Nank and was afraid he would be implicated in the crime.

Nank testified that when the Harstad vehicle stopped, both he and Coleman got into the car. As they proceeded toward Forsyth, Nank turned the ignition key off and maneuvered the vehicle to the side of the road. He tied Harstad's hands together with a yellow nylon rope, removed her clothing except for her blouse and attempted to have sexual intercourse with her but could not maintain an erection. Coleman then got in the back seat with Harstad and had sexual intercourse with her. Nank testified that thereafter he dressed the victim and they drove to the Yellowstone River. Nank carried Harstad over his shoulder to the side of the river. He put her

down, and as they were talking, Coleman came from behind and hit Harstad several times on the head with his motorcycle helmet.<sup>2</sup> Coleman then took the rope from Harstad's hands and attempted to strangle her. Nank said Coleman asked him to help, but he was unable to do so. Both men then carried Harstad, who was unconscious, to a drainage area near the river where they dumped her body. When Harstad attempted to get up, Coleman held her feet and Nank held her head under the water until she was drowned.

## II

### PRIOR COURT PROCEEDINGS

A jury convicted Coleman of deliberate homicide, aggravated kidnapping, and sexual intercourse without consent, inflicting bodily injury. He was sentenced to one hundred years for deliberate homicide and forty years on the rape charge. He was sentenced to death for aggravated kidnapping under Montana's mandatory death penalty statute.<sup>3</sup> On appeal, the Montana supreme court held that the mandatory death penalty statute was unconstitutional. *State v. Coleman*, 177 Mont. 1, 579 P.2d 732,

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<sup>2</sup> The State contended the crack in Coleman's motorcycle helmet was caused by striking Harstad on the head, and that the crack in the helmet was part of the evidence corroborating Nank's testimony. At Coleman's trial, a pathologist testified Harstad's skull had not been fractured.

<sup>3</sup> The statute provided that "[a] court shall impose sentence of death following conviction of aggravated kidnapping if it finds that the victim is dead as a result of the criminal conduct." Rev. Code Mont. § 94-5-304 (1947) (repealed 1977).

741-42 (1978) (*Coleman I*). Coleman's death sentence was vacated and his case was remanded to the trial court for resentencing.<sup>4</sup> Coleman was then resentenced to death in 1978 under a new Montana death penalty statute which had been enacted in 1977. Mont. Code Ann. §§ 95-2206.6 through 95-2206.15 (now codified at Mont. Code Ann. §§ 46-18-301 through 46-18-310; hereinafter cited in pre-codification version, and reproduced at Appendix). Coleman's sentence was automatically reviewed by the Montana supreme court. Mont. Code Ann. §§ 95-2206.12 through 95-2206.15. The court upheld his convictions and sentences. *State v. Coleman*, 185 Mont. 299, 605 P.2d 1000 (1979) (*Coleman II*), cert. denied, 446 U.S. 970 (1980); *Coleman v. Sentencing Review Division of Supreme Court of Montana*, 449 U.S. 893 (1980) (vacating stay of execution of death sentence and denying certiorari).

Thereafter, Coleman filed a petition with the State court for post-conviction relief. His judgment and sentence were once again reviewed and affirmed by the Montana supreme court. *Coleman v. State*, 633 P.2d 624 (Mont. 1981), cert. denied, 455 U.S. 983 (1982) (*Coleman III*).

A petition for writ of habeas corpus under 28 U.S.C. § 2254 was filed in the United States district court for the

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<sup>4</sup> Coleman's sentence for sexual intercourse without consent, inflicting bodily injury was also vacated. The Montana supreme court concluded there was insufficient evidence to show Coleman had inflicted bodily injury upon Harstad in the course of committing sexual intercourse because she was murdered sometime after the rape incident. *Coleman I*, 177 Mont. 1, 579 P.2d at 742-43.

district of Montana in November 1981. The State provided Coleman with a list of all transcripts and proceedings that were recorded but not transcribed in the State court. It was at this time that Coleman's new counsel first learned of the July 2 and July 3, 1975 hearings during which the result of Coleman's sodium amytal test and plea proposals had been disclosed and his then counsel had requested to be relieved as his attorney. The federal habeas corpus proceeding was stayed to provide Coleman the opportunity to exhaust his State remedies for review of his convictions and death sentence in view of these hearings. The Montana supreme court denied Coleman's petition for post-conviction relief. *Coleman v. Risley*, 663 P.2d 1154 (Mont. 1983) (*Coleman IV*).

Coleman then filed a motion for an evidentiary hearing on his habeas corpus petition in the district court. He sought a hearing on twelve of the thirty-seven issues raised in his petition, and filed a motion for summary judgment on the remaining issues. The State also filed a motion for summary judgment. On August 9, 1985, the district court granted the State's motion and entered judgment against Coleman. He appeals.

Coleman contends: (a) his resentencing under the 1977 death penalty statute violated the *ex post facto* clause of the Constitution; (b) Montana's death penalty statute unconstitutionally required him to bear the burden of proof of mitigating factors; (c) his jury panel was selected in an impermissibly discretionary manner; (d) his trial, conviction, and death sentence were the result of racial discrimination; and (e) his sentence was imposed in violation of due process of law.



## III

## EX POST FACTO LAW

Coleman was convicted and first sentenced to death in 1975 under a mandatory death penalty statute subsequently held to be unconstitutional in 1978 by the Montana supreme court in *Coleman I*, 177 Mont. 1, 579 P.2d at 741-42. In 1977, the Montana legislature passed a new death penalty statute, the constitutionality of which was upheld in *State v. McKenzie*, 177 Mont. 280, 581 P.2d 1205, 1228-29 (Mont. 1978), *vacated on other grounds*, 443 U.S. 903 (1979). Coleman was resentenced in 1978 under this new statute. He contends the *ex post facto* clause of the Constitution was violated when he was resentenced to death under the 1977 statute.

To violate the *ex post facto* clause of the Constitution, a law must be retrospective and it must disadvantage the offender affected by it. *Weaver v. Graham*, 450 U.S. 24, 29 (1981); *United States v. Crozier*, 777 F.2d 1376, 1383 (9th Cir. 1985). Furthermore, "[e]ven if a retroactive change in the law is a disadvantage to the criminal defendant, it does not violate the [*ex post facto*] clause if the change is procedural rather than substantive." *United States v. McCahill*, 765 F.2d 849, 850 (citing *Dobbert v. Florida*, 432 U.S. 282, 293 (1977)).

During Coleman's trial, Nank testified on cross-examination that on the day Peggy Lee Harstad was murdered, he and Coleman burglarized a home in Roundup, Montana and stole some guns. The sentencing judge considered this circumstance at the time Coleman was resentenced to death under Montana's amended 1977 death penalty statute. Coleman claims he would not have



cross-examined Nank concerning the Roundup burglary had he known this testimony would eventually be used against him at a sentencing hearing. Under the old death penalty statute Nank's testimony concerning the Roundup burglary would not have had any effect on whether Coleman was sentenced to death. His conviction of aggravated kidnapping mandated a death sentence. He argues that the new sentencing law changed the "rules of the game" to his detriment after his trial and before sentencing.

Coleman is correct that Montana's new sentencing law was enacted after his trial. But the new law did not change the "rules of the game." Nank's testimony regarding the Roundup burglary was admitted at Coleman's trial and was fully admissible at the sentencing hearing under Montana's new sentencing regime. Section 95-2206.7 of the Montana Code authorizes the sentencing judge to receive "evidence . . . as to any matter the court considers relevant to the sentence, . . . and any other facts in aggravation or mitigation of the penalty." Mont. Code Ann. § 95-2206.7. In evaluating mitigating circumstances, the judge considers, among other things, the defendant's "prior criminal activity." *Id.* § 95-2206.9(1). Coleman's argument that the new law disadvantaged him rests upon the unsubstantiated assumption that the circumstance of the Roundup burglary would not have been brought to the attention of the court at the sentencing hearing, *but for* Coleman's cross-examination of Nank at trial. Coleman has provided nothing to support this assumption. See *Dobbert*, 432 U.S. at 294 (discussed *infra*; rejecting petitioner's "speculation" that jury would have

recommended life imprisonment had prior law still been in effect).

Coleman's counsel suggested at oral argument that Coleman's trial counsel would have cross-examined Nank differently and scrutinized his testimony about the Roundup burglary more effectively had the new sentencing law been in effect. Given that Nank and Coleman testified as to conflicting accounts of the events the day the murder occurred, the suggestion that Coleman's attorney had no motive to scrutinize Nank's recollection of the burglary which Nank said occurred on the day of the murder is unconvincing. Further, Coleman has not shown he was denied the opportunity to reexamine Nank at the sentencing hearing. See our discussion *infra* section VII, 3b. However, even if we were to accept Coleman's assumption, the Supreme Court's holding in *Dobbert* dictates rejection of his *ex post facto* claim.

In *Dobbert*, Dobbert committed crimes when Florida had an unconstitutional death penalty statute which punished a defendant with death unless the jury recommended mercy. 432 U.S. at 288. By the time Dobbert was brought to trial, Florida had enacted a constitutional statute; the new law removed the presumptive death sentence, but permitted the judge to override the jury's recommendation of lenience. *Id.* at 290-91. At Dobbert's trial, the jury by a ten-to-two majority found sufficient mitigating circumstances to outweigh any aggravating circumstances and returned an advisory verdict recommending life imprisonment. *Id.* at 287. The trial judge, however, overturned this recommendation and sentenced Dobbert to death. Dobbert argued that the new law violated the *ex post facto* clause because (among other things)

under the former death statute the jury's recommendation of life would not have been subject to the trial judge's nullification. The Court rejected this argument on two independent grounds, both present here: the new Florida law was procedural, and it was ameliorative. *Id.* at 292 & n.6.

#### A. Procedural Change

The Court in *Dobbert* began its analysis by reiterating the "well settled" principle that the *ex post facto* clause does not " 'limit the legislative control of remedies and modes of procedure which do not affect matters of substance.' " *Id.* at 293 (quoting *Beazell v. Ohio*, 269 U.S. 167, 171 (1925)). As a corollary to this principle, the Court noted "[e]ven though it may work to the disadvantage of a defendant, a procedural change is not *ex post facto*." *Id.* The Court discussed two cases to support this proposition. *Thompson v. Missouri*, 171 U.S. 380 (1898); *Hopt v. Utah*, 110 U.S. 574 (1884). In *Thompson*, the Missouri supreme court reversed the defendant's conviction because of the inadmissibility of certain evidence in a case tried on circumstantial evidence. Prior to his retrial, the law was changed to make the evidence admissible and the defendant was again convicted. The *Thompson* Court held that the change which rendered the incriminating evidence admissible was procedural and did not violate the *ex post facto* clause because it "did not enlarge the punishment to which the accused was liable when his crime was committed, nor make any act involved in his offense criminal that was not criminal at the time he committed the murder of which he was found guilty." 171 U.S. at 387. Similarly in *Hopt*, the Court held that a statute

removing disqualification of certain classes of people who could be witnesses was procedural and hence did not violate the *ex post facto* clause. 110 U.S. 574. See also *Beazell*, 269 U.S. 167 (*passim*; new law on joint trial procedural). The Court in *Dobbert* concluded on the basis of the foregoing authorities that the change in Florida's sentencing law was procedural and therefore was not *ex post facto*. 432 U.S. at 293-94.

In the present case, as in *Dobbert*, *Thompson* and *Hopt*, Montana's new sentencing statute is procedural. The statute "simply altered the methods employed in determining whether the death penalty was to be imposed. . . .", *Dobbert*, 432 U.S. at 293-94, and did not change the punishment prescribed, or the quantity or degree of proof necessary to establish guilt. *Id.* (citing *Hopt*, 110 U.S. at 589-90). See also *McCahill*, 765 F.2d at 850-51 (law affecting bail pending appeal procedural); *Knapp v. Cardwell*, 667 F.2d 1253, 1262-63 (9th Cir.) (Arizona death penalty law enlarging ability to introduce mitigating factors held procedural), *cert. denied*, 459 U.S. 1055 (1982); *Ward v. California*, 269 F.2d 906 (9th Cir. 1959) (*passim*) (state law allowing introduction of evidence of defendant's background and history and of any facts in aggravation or mitigation of death penalty was procedural; one judge denial of certificate of probable cause, per Pope, J.). Even if Montana's new statute disadvantaged Coleman, therefore, it is procedural and not *ex post facto*.

#### B. Ameliorative Change

The Court in *Dobbert* further held that Florida's new death penalty statute, viewed *in toto*, was ameliorative.

The former statute established a presumption in favor of the death penalty and was unconstitutional. 432 U.S. at 294-97. The new Florida law, in contrast, established extensive procedural protections and had been upheld in *Proffitt v. Florida*, 428 U.S. 242 (1976). Here, Coleman was first sentenced under a mandatory death penalty statute which was unconstitutional. Thereafter, he was sentenced under a new statute which established extensive procedural safeguards (Mont. Code Ann. §§ 95-2206.6 through 95-2206.15) and is constitutional. *Coleman II*, 185 Mont. 299, 605 P.2d 1016-17 (and discussion *infra* section IV).

Coleman attempts to distinguish *Dobbert* by arguing that whereas *Dobbert* was tried, convicted and sentenced under a constitutional statute, he was tried and convicted under an unconstitutional mandatory death penalty statute, but sentenced under a constitutional statute. Relying on *Dobbert*, we rejected an identical *ex post facto* challenge to the Arizona death penalty statute in *Knapp*, 667 F.2d at 1262-63. In *Knapp*, several of the appellants were tried, convicted and sentenced under an Arizona death penalty statute later declared unconstitutional. Thereafter, their sentences were vacated and they were resentenced to death under a constitutional statute. *Id.* at 1257-58. We rejected appellants' attempt to distinguish *Dobbert* as a "distinction without *ex post facto* implications," *id.* at 1262, because the new statute was "both procedural and ameliorative." *Id.* at 1263. The effect of the new Arizona statute, like the new Montana statute, was to "enlarge the ability of defendants to introduce mitigating circumstances at sentencing." *Id.* Thus, "it 'neither made criminal a theretofore innocent act, nor aggravated a crime



previously committed, nor provided greater punishment, nor changed the proof necessary to convict.' " *Id.* (citation omitted).

### C. The Review Process

Coleman also argues that the new statute violated the *ex post facto* clause because it changed the process by which a sentence of death was reviewed in Montana. Under Montana's death penalty statute in force at the time Coleman committed the acts of which he was convicted, and at the time he was tried and first sentenced to death, he had a statutory right to have his sentence reviewed by a Sentence Review Division. Mont. Code Ann. §§ 95-2502, 2211 (amended 1977). This review was designed to determine the appropriateness of the sentence with respect to the individual offender and particular offense, *McKenzie*, 171 Mont. 278, 557 P.2d at 1029, and gave a convicted person the "right to have his sentence reviewed for equity, disparity, or consideration of justice." *State ex rel. Greely v. District Court*, 180 Mont. 317, 590 P.2d 1104, 1110 (1979).

The new statute abolished review of death sentences by the Sentence Review Division and replaced it with automatic review by the Montana supreme court. *Coleman II*, 299, 605 P.2d at 1006; Mont. Code Ann. §§ 95-2206.12 through 95-2206.15. Under the new law, the State supreme court reviews a death sentence to determine (1) whether the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor; (2) whether the evidence supports the sentencing judge's findings of the existence or nonexistence of aggravating



and mitigating circumstances listed in the new statute; and (3) whether the sentence is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. *Id.* § 95-2206.15. Coleman contends this is a substantive change because the Montana supreme court's review is limited, whereas the review commission had wide discretion to reverse a death sentence "for equity, disparity, or consideration of justice." This argument proceeds on the false premise that the Montana supreme court's review is "limited." It also overlooks the fact that while nebulous considerations of "equity" and "justice" could have operated to a defendant's advantage in reversing a death sentence under the old law, those vague terms could just as easily have worked to his disadvantage in upholding a death sentence arbitrarily imposed. See *Dobbert*, 432 U.S. at 294 (finality of jury determination of life or death under old law could operate equally to defendant's advantage or disadvantage; change in law to permit review by court not *ex post facto*).

Moreover, the Montana supreme court's review is not "limited" to a restricted list of mitigating circumstances. The court reviews a death sentence to determine whether the evidence supports the sentencing judge's findings of the existence or nonexistence of aggravating and mitigating circumstances specified in Mont. Code Ann. §§ 95-2206.8 and 92-2206.9. There is, in addition, a final all-encompassing subsection (8) that requires consideration of "[a]ny other fact . . . in mitigation of the penalty." *Id.* § 95-2206.9(8). While this final aspect of the court's review is focused on facts which were presented to the sentencing judge, the Montana supreme court

makes an additional independent review of the case to determine whether the sentence was imposed under influence of passion, prejudice, or other arbitrary factors, *id.* § 95-2206.15(1), and whether the sentence is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. *Id.* § 95-2206.15(3). These review procedures, coupled with the review of mitigating factors, provide at least the same, if not greater, breadth of review as existed under the former statute, and provide a defendant with the added protection that his sentence review will not be limited to the potentially arbitrary application of a reviewing court's notions of "equity" and "justice."

We conclude, as did the district court and the Montana courts, that no *ex post facto* violation occurred by the application of Montana's 1977 death penalty statutes to Coleman in imposing the death sentence upon him.

#### IV

#### BURDEN OF BRINGING FORTH EVIDENCE IN MITIGATION

In *Fitzpatrick v. State*, 638 P.2d 1002 (Mont. 1981), the Montana supreme court held that Montana's death penalty statute did not impose upon the State the burden of proving the nonexistence of mitigating circumstances, but rather, placed the burden on the defendant "to bring forth the evidence pertinent to the question of mitigation." *Id.* at 1013. The court stated that "[t]his statute undoubtedly places the burden on the defendant to show that his life should be spared, but we find this to be constitutionally permissible." *Id.* (discussing *Coleman II*,

185 Mont. 299, 605 P.2d 1000 (1979), and *State v. Stewart*, 175 Mont. 286, 573 P.2d 1138, 1146 (1977).<sup>5</sup> Coleman argues that "[b]y requiring the defendant to bear the burden of establishing the presence of mitigating circumstances, and by requiring the sentencing authority to weigh the 'substantiality' of the mitigating circumstances, the Montana statute prevents the kind of individualized attention to the appropriateness of the death sentence that the Constitution demands."

To resolve Coleman's contention, we must examine two lines of Supreme Court authority which have intersected only once before in this court. See *Harris v. Pulley*, 692 F.2d 1189, 1194-95 (9th Cir. 1982) (involving state

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<sup>5</sup> We do not read *Fitzpatrick* as stating that a defendant must prove mitigating circumstances beyond a reasonable doubt. *Fitzpatrick* does not impose such a standard, nor does it require the defendant to prove mitigating factors by clear and convincing evidence or by a preponderance of evidence. 638 P.2d at 1013. Rather, *Fitzpatrick* holds that the State does not bear the burden of proof and that the defendant bears the burden of "bringing forth the evidence pertinent to the question of mitigation." *Id.* See *McMillan v. Pennsylvania*, 106 S. Ct. 2411, 2420 (1986) (sentencing courts often hear evidence presented without "clear and convincing" burden requirement or other such burden). The transcript of the sentencing hearing (see *infra* section VII) does not indicate that the court required Coleman to prove mitigation beyond a reasonable doubt; the record in fact reveals no burden allocation. Coleman raised the issue of burden allocation both in the State courts and district court.

On burden of production generally, see *Lew v. Moss*, 797 F.2d 747, 751 (9th Cir. 1986).

death penalty statute relieving state from burden of proving non-existence of mitigating factors beyond a reasonable doubt), *reversed on other grounds*, 465 U.S. 37 (1984). These are cases involving the facial adequacy of a state's death penalty statute as measured by the eighth and fourteenth amendments, *see, e.g., Gregg v. Georgia*, 428 U.S. 153 (1976), and cases involving the allocation of the burden of proof in establishing guilt, *see, e.g., In re Winship*, 397 U.S. 358 (1970).

#### A. Facial Adequacy of Statute

In *Gregg*, a plurality of the Court stated that the constitutional concerns expressed in *Furman v. Georgia*, 408 U.S. 238 (1972) – that a court not act in an arbitrary or capricious manner – are best satisfied “by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information.” 428 U.S. at 195. The Montana death penalty statute provides for a bifurcated sentencing procedure conducted by the judge who presided at the trial or before whom the guilty plea was entered. Mont. Code Ann. § 95-2206.6. The defendant may present any probative evidence regarding aggravating or mitigating circumstances. *Id.* § 95-2206.7. The Montana statute also satisfies the general criteria established in *Gregg*, *Proffitt*, 428 U.S. 242, *Jurek v. Texas*, 428 U.S. 262 (1976) and *Lockett v. Ohio*, 438 U.S. 586 (1978), for constitutional state death penalty statutes: the statute requires the sentencing judge to find at least one aggravating circumstance, Mont. Code Ann. § 95-2206.10; the judge must consider mitigating circumstances and must

find that no mitigating circumstance is sufficiently substantial to call for leniency, *id.* §§ 95-2206.7, 95-2206.9 and 95-2206.10; and the defendant receives prompt and extensive judicial review, *id.* § 95-2206.10 (and discussion *supra*). See, e.g., *Spaziano v. Florida*, 468 U.S. 447, 466 (1984) (upholding similar statute). That the Montana statute does not require the State to prove the absence of mitigating circumstances, and permits the trial judge to weigh and balance mitigating and aggravating circumstances, does not violate the guidelines established in these cases. See *Proffitt*, 428 U.S. at 257-58 (upholding statute that did not impose a burden on state and permitted sentencing authority to balance factors in mitigation and aggravation); *Jurek*, 428 U.S. at 276 (allowing defendant to bring forth evidence on mitigation, but imposing no such burden on state); *Harris*, 692 F.2d at 1195 (interpreting *Proffitt* in similar fashion); accord *McMillan v. Pennsylvania*, 106 S. Ct. 2411, 2420 (1986) (same).

### B. Allocation of Burden of Proof

The Supreme Court's pronouncements on the proper allocation of the burden of proof in criminal cases do not alter this conclusion. In *Winship*, 397 U.S. 358, the Court held that due process prevents conviction except upon proof beyond a reasonable doubt of every fact or element of the crime charged. *Id.* at 364. See also *Mullaney v. Wilbur*, 421 U.S. 684 (1975). *Winship* and *Mullaney* emphasized society's interest in the reliability of jury verdicts:

The requirement of proof beyond a reasonable doubt has [a] vital role in our criminal procedure for cogent reasons. The accused during a criminal prosecution has at stake interests of immense importance,



both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. . . .

421 U.S. at 699-700 (quoting *Winship*, 397 U.S. at 363); see also *Winship*, 397 U.S. at 372 (Harlin, J. concurring).

In *Patterson v. New York*, 432 U.S. 197 (1977), the Court refined the principles established in *Winship* and *Mullaney*. There appellant was charged with second-degree murder which, under New York law, contained only two elements: intent to cause death; and causing death. *Id.* at 198. New York permitted the defendant to raise as an affirmative defense the mitigating circumstance of acting under extreme emotional disturbance, but the jury was instructed that the defendant bore the burden of proving the defense by a preponderance of evidence. *Id.* at 200. Appellant argued that placing the burden on a defendant to prove "mitigating factors" violated *Winship* and *Mullaney*. Specifically, he argued that *Mullaney's* "holding . . . is that the State may not permit the blameworthiness of an act or the severity of the punishment authorized . . . to depend on the presence or absence of an identified fact without assuming the burden of proving the presence or absence of that fact . . . beyond a reasonable doubt." *Id.* at 214. The Court held, however, that *Mullaney* and *Winship* only required the State to prove each element of the crime for which the defendant is charged:

*Mullaney* surely held that a State must prove every ingredient of an offense beyond a reasonable doubt, and that it may not shift the burden of proof to the defendant by presuming that ingredient upon proof of the other elements of the offense. This is true even though the State's practice, as in Maine, had



been traditionally to the contrary. Such shifting of the burden of persuasion with respect to a fact which the state deems so important that it must be either *proved* or *presumed* is impermissible under the Due Process Clause.

*Id.* at 215 (emphasis added).

*Winship*, *Mullaney* and *Patterson* teach that due process "requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged." *Patterson*, 432 U.S. at 210. See also *McMillan*, 106 S. Ct. at 2416. Under Montana law, circumstances affecting mitigation are not facts or elements of the crime for which a defendant is charged; rather, they are facts weighed by the sentencing judge after the defendant has been convicted. Mont. Code Ann. § 95-2206.6. See, e.g., *McMillan*, 106 S. Ct. at 2417 (noting this fundamental distinction); *id.* at 2420 & n.8 (discussing *Proffitt*); *Patterson*, 432 U.S. at 226-27 (Powell, J., dissenting); *Foster v. Strickland*, 707 F.2d 1339, 1345 (11th Cir. 1983), *cert. denied*, 466 U.S. 983 (1984); *Ford v. Strickland*, 696 F.2d 804, 817-18 (11th Cir.) (en banc) (per curiam) (due process not violated when sentencing authority is permitted to weigh aggravating and mitigating circumstances after state has proven aggravating circumstances), *cert. denied*, 464 U.S. 865 (1983); *Andrews v. Shulsen*, 600 F. Supp. 408, 423 (D. Utah 1984); *Richmond v. Cardwell*, 450 F. Supp. 519, 524-25 (D. Ariz. 1978), *later proceeding*, *Richmond v. Ricketts*, 774 F.2d 957 (9th Cir. 1985). Accord *Harris*, 692 F.2d at 1195. Nor under Montana law is the existence of mitigating circumstances a fact which must be "proved or presumed" in obtaining a conviction or even in imposing sentencing. *Patterson*, 432 U.S. at 215. Montana only requires the

sentencing judge to find one aggravating circumstance, Mont. Code Ann. § 95-2206.10, and then to consider mitigating circumstances. The statute comports with the general standards enunciated in *Gregg*, *Proffitt*, *Jurek*, and *Lockett* and does not transgress the specific limitations established in *Winship*, *Mullaney*, and *Patterson*.

Finally, in *Patterson* and recently in *McMillan*, 106 S. Ct. 2411, the Court has recognized that due process may limit a state's authority to define elements or facts necessary for a crime. *Id.* at 2416 (citing *Patterson*, 432 U.S. at 211 n.12). See generally *McGautha v. California*, 402 U.S. 183, 206 n.16 (1971) (noting that aggravating circumstances could have been part of offense but instead were used as post-conviction enhancement). Several factors convince us that due process does not require Montana to disprove the existence of mitigating circumstances in order to impose a death sentence. *First*, as noted, the Court has approved of several death penalty statutes imposing no such burden on the state. See, e.g., *Jurek*, 428 U.S. at 276. *Second*, the Montana death penalty statute establishes no presumptions and does not relieve the State of its burden of proving the defendant's underlying guilt. See *McMillan*, 106 S. Ct. at 2417. *Third*, mitigating circumstances as defined under Montana's death penalty statute permit the sentencing authority to exercise leniency. See *Patterson*, 432 U.S. at 203 n.9 ("the Due Process Clause did not invalidate every instance of burdening the defendant with proving an exculpatory fact"). They do not increase the punishment. *Id.* Compare *McMillan*, 106 S. Ct. 2411 (rejecting due process argument

that state definition of element in *aggravation* in sentencing defendant must be proven beyond a reasonable doubt); *id.* at 2421-26 (Stevens, J., dissenting).

We therefore reject Coleman's argument regarding the allocation of the burden under Montana's death penalty statute and the trial court's weighing and balancing of mitigating and aggravating circumstances.

## V

### JURY SELECTION

Following a challenge by the defendant three days before trial, the trial court dismissed the first jury panel and ordered a second panel drawn. Each name on the jury list was assigned a number, the numbers were placed in a box, and 200 were drawn. The court then directed the court clerk to obtain a panel of sixty jurors by telephoning persons drawn from the box to see if they would be available to serve on a jury within the next three days. Sixty-one of the prospective jurors indicated they would be available and sixty appeared for Coleman's trial. *Coleman I*, 177 Mont. 1, 579 P.2d at 746-47. It was from this panel that Coleman's trial jury was chosen.

Coleman contends that the sixty persons making up his jury panel were selected in an impermissibly discretionary manner. He alleges that potential jurors were asked whether they could appear for his trial and were allowed to excuse themselves on grounds not revealed to him. He further alleges that the system by which his

panel of sixty potential jurors was selected had the disproportionate effect of placing mainly white, affluent residents from the west side of Billings on the panel. He argues that this system was controlled, not random, and resembled the so-called "key man" system of jury selection.<sup>6</sup>

Coleman contends that he is entitled to an evidentiary hearing on this issue. To obtain an evidentiary hearing, Coleman "must show that (1) he has alleged facts which, if proved, would entitle him to relief, and (2) an evidentiary hearing is required to establish the truth of his allegations." *Harris*, 692 F.2d at 1197; see also *Bashor v. Risley*, 730 F.2d 1228, 1233 (9th Cir.), cert. denied, 105 S. Ct. 137 (1984).

#### A. Lack of Showing of Distinctive Group

Trial by a jury of one's peers contemplates that an impartial jury will be drawn from a fair cross-section of the community. *Thiel v. Southern Pacific Co.*, 328 U.S. 217,

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<sup>6</sup> Coleman's argument that his jury panel was selected using the key man system is without merit. The key man system of jury selection involves the selection of particular persons to make up a pool from which a jury is then chosen at random. It is not unconstitutional on its face. *Castaneda v. Partida*, 430 U.S. 482, 497 (1977); *United States v. Nelson*, 718 F.2d 315, 319 (9th Cir. 1983). Here there is nothing to suggest the jury panel was chosen using the key man system. The initial 200 jurors were selected at random. Cf. *Castaneda*, 430 U.S. at 497. The panel of sixty potential jurors were in essence volunteers, a fact which standing alone does not render the composition of a panel unconstitutional. *Nelson*, 718 F.2d at 319.

220 (1946). The sixth amendment does not guarantee a randomly selected jury, *United States v. Wellington*, 754 F.2d 1457, 1468 (9th Cir.), cert. denied sub nom., *Utz v. United States*, 106 S. Ct. 592, 593 (1985), nor does it require that the jury contain representatives from every group in the community. *Lockhart v. McCree*, 106 S. Ct. 1758, 1764-65 (1986); *Thiel*, 328 U.S. at 220. A fair cross-section challenge to the constitutionality of the jury venire requires a showing:

- (1) That the group alleged to be excluded is a 'distinctive' group in the community;
- (2) That the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and
- (3) That this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

*United States v. Miller*, 771 F.2d 1219, 1228 (9th Cir. 1985) (quoting *Duren*, 439 U.S. at 364).

Coleman contends that as a result of the jury selection process, persons from the lower socioeconomic areas of Billings were excluded from his panel of prospective jurors. He has not alleged any facts, however, from which it could be concluded that persons from the lower socioeconomic areas of Billings, Montana formed a distinctive group in the community, or that if such a group existed it consisted of a sufficient number of persons so that its systematic exclusion from jury panels would support a fair cross-section challenge under the sixth amendment.



*Duren*, 439 U.S. at 364; see also *Taylor v. Louisiana*, 419 U.S. 522, 531 (1975). See *United States v. Kleifgen*, 557 F.2d 1293 (9th Cir. 1977) (*passim*); *United States v. Potter*, 552 F.2d 901, 904-05 (9th Cir. 1977). Having failed to demonstrate the existence of a "distinctive" group, Coleman's claims that such a group was underrepresented in jury venires or was systematically excluded in the jury selection process also fail.

#### B. Method of Selection of Available Jurors

Coleman challenges the clerk's dismissal of 139 of the 200 potential jurors drawn from the box. There is nothing in the record, however, to suggest that the jurors who were excused by the clerk were excused for any reason other than their inability to serve in a jury trial which was to commence in three days. *Coleman I*, 177 Mont. 1, 579 P.2d at 746. Coleman does not contend, nor does the record reveal, that the 200 names from which the 60 members of his panel were chosen do not represent a fair cross-section of the community.

The method of jury selection in Coleman's case was similar to that which occurred in *United States v. Anderson*, 509 F.2d 312 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 991 (1975). There, 200 to 300 jurors were selected for jury service. The defendant did not contend that these jurors were not representative of a fair cross-section of the community. The jurors were told that the trial would be lengthy and the court asked how many jurors would be able to serve. Sixty-eight jurors indicated they would be available, and sixty of these were selected for the panel. *Id.* at 321. On appeal the defendant contended the jurors



were composed of volunteers and thus did not represent a cross-section of the community. *Id.* In rejecting this contention, the court concluded that the underlying complement of jurors represented a fair cross-section of the community and "[n]either the panel nor the trial jury became any less so by reason of the technique the judge employed." *Id.* at 322. The court went on to state, "the judge did not exclude anyone or any cognizable group. The sole criterion he employed was ability to serve longer; the panel from which the jury was drawn was distinguished only by that quality." *Id.*; see also *United States v. Branscome*, 682 F.2d 484, 485 (4th Cir. 1982); *United States v. Kennedy*, 548 F.2d 608, 611 (5th Cir.), *reh'g denied*, 554 F.2d 476 (5th Cir.), *cert. denied*, 434 U.S. 865 (1977).

Coleman did not present any affidavit or other evidence to suggest jurors were dismissed for any reason other than unavailability. His challenge to the sixty-person jury panel "consists exclusively of counsel's statements, unsworn and unsupported by any proof or offer of proof." *Frazier v. United States*, 335 U.S. 497, 503 (1948). These "conclusory allegations do not provide a sufficient basis to obtain a hearing in federal court." *Harris*, 692 F.2d at 1199.

Finally, Coleman argues in his reply brief that the trial judge improperly disqualified two jurors because of their opposition to the death penalty. He has failed to present any showing that would justify an evidentiary hearing on this issue. *Maggio v. Williams*, 464 U.S. 46, 50 (1983) (*per curiam*).

VI

RACIAL DISCRIMINATION

Coleman contends he was tried, convicted, and sentenced to death as a result of pervasive racial discrimination. He points to the fact that Nank, a white man, was permitted to plead guilty to crimes which did not carry the death penalty, whereas Coleman, a black, was denied the same bargain. He also points to the trial judge's reference to him as a "black boy." He contends he was entitled to a hearing on these contentions.

*A. The Plea Bargain*

The State permitted Nank to plead guilty to charges which did not carry the death penalty because he admitted his involvement in Harstad's murder and assisted the State in its investigation and prosecution of Coleman. On the other hand, Coleman maintained his innocence. When he first offered to plead guilty to non-capital charges, he insisted on maintaining his innocence as a condition of such a plea. The State was under no duty to accept Coleman's offer. The prosecution may refuse to bargain altogether, or cut off negotiations at any time. *United States v. Herrera*, 640 F.2d 958, 962 (9th Cir. 1981) (prosecution of defendant on original indictment upheld notwithstanding prosecution's acceptance of co-defendant's plea bargain).

When Coleman finally offered to accept the same deal accepted by Nank, he did so only after he had undergone a sodium amytal procedure which the State regarded as questionable. Before then, Coleman's former

counsel had claimed he was ineffective due to his lack of experience. Coleman had also contended that a change of venue had not been sufficient to eliminate prejudice against him. The State was concerned about the voluntariness of the plea. Moreover, the State already had Nank's agreement to testify against Coleman. Nank had pursued precisely the course which Justice Blackmun suggested should have been pursued by one the defendants in *Burger v. Kemp*, 107 S. Ct. 3114, 3126 (1987) (Blackmun, J., dissenting). There, in commenting that the defendant's lawyer had been remiss in not offering the defendant's testimony against his co-defendant in exchange for a life sentence, Justice Blackmun stated: "[T]he prosecutor might have decided that . . . he would permit [the defendant] to plead to a life sentence in exchange for his testimony against [his co-defendant] and pursue the death sentence against [the co-defendant]." *Id.* at 3133 n.12. Here, this is what the prosecutor did. He allowed Nank to plead to a life sentence in exchange for his testimony against Coleman, and pursued the death sentence against Coleman.

The record reveals no evidence of racial prejudice. Despite the absence of this evidence, the dissent insists "[t]he key inquiry here must be as to the prosecutor's motives in repeatedly and vigorously refusing to accept, or even consider accepting, Coleman's guilty plea. . . ." (Reinhardt, J. dissent at page 13). However, as the Supreme Court stated in *McCleskey v. Kemp*, 107 S. Ct. 1756 (1987), "[T]he policy considerations behind a prosecutor's traditionally 'wide discretion' suggest the impropriety of our requiring prosecutors to defend their decisions to seek death penalties, often years after they

were made." *Id.* at 1768 (footnotes and citations omitted). The Court further stated, "Our refusal to require that the prosecutor provide an explanation for his decisions . . . is completely consistent with this Court's longstanding precedents that hold that a prosecutor need not explain his decisions unless the criminal defendant presents a prima facie case of unconstitutional conduct with respect to his case." *Id.* at 1769 n. 18 (citations omitted). Coleman has not set forth any facts which would support a prima facie case of unconstitutional conduct. As the dissent notes, Coleman makes "a concrete claim of unequal treatment on the basis of race." (Reinhardt, J. dissent at page 7). This may be so, but he presents no facts to support the claim.

We conclude that the State had no obligation to accept Coleman's plea bargain offer. See *Hererra* [sic], 640 F.2d at 962; accord *United States v. Pleasant*, 730 F.2d 657, 663-65 (11th Cir.) (involving offer made and withdrawn when not initially accepted), *cert. denied*, 105 S. Ct. 216 (1984). Neither the State's acceptance of Nank's plea offer nor Coleman's death sentence alters this analysis. See *Brooks v. Estelle*, 697 F.2d 586, 588 (5th Cir.), *stay denied*, 459 U.S. 1061 (1982); *McMillin* [sic] *v. United States*, 583 F.2d 1061, 1063 (8th Cir.), *cert. denied*, 439 U.S. 1049 (1978).

#### B. "Black Boy" Reference

Coleman points to the trial court's reference to him as a "black boy" to support his allegation of racial discrimination. The use of the term in reference to Coleman was first made during the trial by Coleman's own counsel during cross-examination of a witness. The court's use of

the phrase occurred in chambers in ruling on a motion for dismissal or judgment of acquittal at the close of the government's case. At that point in the proceedings the following colloquy occurred:

- Prosecution: May the record show that the prosecution resists the motion.
- The Court: Well, I treat this as a real serious motion.
- Prosecution: In what regard?
- The Court: Well, I'm not going to grant the motion, but I say it has some merit.
- Prosecution: I frankly don't think it has any. We could have gotten to the jury on circumstantial evidence alone, Your Honor, and I'm confident of that.
- The Court: Well, all you've shown is the opportunity for this black boy to do it. You've shown plenty of opportunity.

We have expressed concern about the influence race may have in the imposition of the death penalty. *Harris*, 692 F.2d at 1198 n.4. "The risk of racial prejudice infecting a capital sentencing proceeding is especially serious in light of the complete finality of the death sentence." *Turner v. Murray*, 106 S. Ct. 1683, 1688 (1986). We do not agree with the State that the court's reference to Coleman as a "black boy" was "charitable;" however, when placed in context and viewed in light of the entire trial transcript, it does not establish Coleman's claim of racial discrimination. See *United States v. Herbert*, 698 F.2d 981, 984 (9th Cir.) (defendant must show prejudice stemming from comment), *cert. denied*, 464 U.S. 821 (1983); *United States v. Price*, 623 F.2d 587, 592-93 (9th Cir.) (same), *cert.*

*denied*, 449 U.S. 1016 (1980); *James v. State*, 270 Ark. 596, 605 S.W.2d 448, 451 (1980) (in chambers reference to defendant as "boy" not prejudicial); *People v. McGowen*, 269 Cal. App. 2d 740, 743, 75 Cal. Rptr. 53, 54-55 (1969) (no prejudice from unobjected to comment). Compare *Berry v. United States*, 283 F.2d 465, 467 (8th Cir. 1960) (repeated racial comments made in jury's presence held prejudicial), *cert. denied*, 364 U.S. 934 (1961); 34 A.L.R. 3d 1313, 1320, 1328-30 & n.19 (1970 & Supp. 1986) (discussing cases). Cf. *Harris*, 692 F.2d at 1197 (evidentiary hearing required when facts in dispute and if proved entitled defendant to relief).

## VII

### SENTENCING HEARING

Coleman argues that the sentencing hearings and the trial court's "FINDINGS, CONCLUSIONS, JUDGMENT AND ORDER" ("Findings") dated July 10, 1978, violated due process. Before evaluating his contentions, we examine these proceedings and the court's Findings.

#### A. The June 14th Hearing

By its decision in *Coleman I*, the Montana supreme court affirmed Coleman's convictions on all counts. His sentence to serve one hundred years on Count I for deliberate homicide was affirmed. His death sentence for aggravated kidnapping and his sentence to serve forty years for sexual intercourse without consent, inflicting bodily injury, were vacated. The case was remanded to the trial court for resentencing. The remand was received by the trial court on June 2, 1978. On that day the judge



who had previously sentenced Coleman to death notified counsel of record that Coleman's sentencing hearing would be held June 14, 1978, and that the hearing would be conducted "in accordance with section 95-2206.06 through 95-2206.11, RCM, as amended."

At the beginning of the June 14th hearing, the court stated that it "had set down for hearing today the matter of mitigation of punishment, intended to reserve for a subsequent date the sentencing." Defense counsel had filed a motion that day challenging the constitutionality of applying the newly amended 1977 death penalty statutes to Coleman's case. The State had not responded to this motion. The court stated: "Of course the first question that arises in the Court's mind, is should the Court [proceed] with the hearing at this time on the matter of mitigation, and of course on one count the Court feels that it may as well proceed, but I'd like to hear from you [defense counsel]." Coleman's counsel suggested that the State might want an opportunity to respond to his motion, and stated:

I would suggest that the Court continue, and I'm not making this in the form of a formal motion, but I am suggesting that the Court continue this matter in regard to sentencing. . . . In addition, Your Honor, and as another point which has some bearing upon the Court's determination as to how to proceed, is that we have to present here at this time, no mitigating factors at all. It would be a matter of simply argument. There is a pre-sentence investigation report. I take the view that the situation is primarily one of law, to be resolved as to how the Court should proceed, and then I take the view that unless [the State] wishes to present witnesses, that at the time of sentencing is just simply a statement by [the State's attorney] pointing out what he thinks relevant and a

statement pointing out what I think is relevant, and the Court decides if that's the way we are to proceed.

The court stated:

Well, the Court has two matters to sentence on, and there is always a possibility that after the Court has considered [defense counsel's] brief, it might rule favorably on [defense counsel's] motion, and in that event there would be no necessity for the Court to make any finding [of aggravating or mitigating circumstances] or anything else under the—under the existing statute. . . . So I think we are just going to proceed particularly with the announcement that you didn't intend to present any mitigating circumstances, and particularly because there is another count upon which this Court was called upon to reimpose sentence. I'll call then—or ask for responding briefs to the brief that has now been submitted by the defendant. The Court has received—I called for and have received a pre-sentence report, which I now cause to be filed in accordance with the law. The reporting officer, Mr. Thomas Lofland, is present in court. The defendant has received a copy of this presentence investigation. The significant part of it relative to mitigating circumstances is that the defendant has never been convicted of any felony prior to this charge. Now if there are any matters which either the State or the defense wish to clarify with reference to this report, Mr. Lofland is present and you may call him to the stand and you may make any inquiries that you feel are pertinent.

Neither side elected to call the reporting officer, Mr. Lofland, as a witness. The court then stated:

Now with the announcement that the defense does not intend to produce any—call any witnesses to establish any mitigating circumstances, the Court of course has before it all matters during the course of

the trial, heard the testimony relating to the aggravating circumstances and also some to mitigating circumstances.<sup>7</sup> Does counsel for the State now wish to make any statement relative to aggravating circumstances?

In response, the State attempted to call Coleman as a witness, but he declined to testify. The court then stated that it would "render its findings of fact and will go up on the record that is present in the absence of any mitigating circumstances presented by the defendant at this hearing." It was agreed that the State would file a brief in which it would point out the places in the trial transcript which it believed contained references to aggravating and mitigating circumstances, and the defense would have an opportunity to respond to that brief. The court asked the State if it wanted to make proposed findings of fact, and the State responded that it would do so. The court also invited the defense to prepare proposed findings. The hearing was then adjourned.

#### B. *The July 10th Hearing*

The court set July 10, 1978 as the date for Coleman's sentencing. On that date, at the beginning of the hearing, the court handed counsel for Coleman and the State an unsigned copy of its Findings. Coleman's attorney did not raise an objection to this procedure. After resolving a preliminary matter, the court stated:

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<sup>7</sup> At his trial, Coleman testified to his previous clean criminal record, military service, psychological problems, and community service.

Well, I want you to know that I have considered all of - everything that you have submitted and have given it thought, and that this isn't just a matter that the Court takes lightly . . . . The court has set this time for sentencing of the defendant. Since the sentencing hearing, the Court has received copies of briefs and has considered the motion of the defendant to quash and having studied and considered the matter, has prepared its findings as required by law. Before pronouncing sentencing, [sic] does counsel have anything to say to the Court?

Defense counsel then read into the record a statement he had prepared on Coleman's behalf. He asked the court to consider that Coleman had never "been in any trouble before," that the crimes of which he had been convicted were inconsistent with his "whole history as shown by the records in this case," and that reports from people who had known Coleman in Great Falls, Montana where he had worked were favorable. The State responded, arguing among other things, that Coleman had initiated the attempts to kill Harstad, that Harstad had been killed to "destroy the evidence" of her kidnapping and sexual assault, that according to the pre-sentence report Coleman had feigned homosexuality to convince the court he did not rape the victim, and that Coleman's guilt had been determined beyond a reasonable doubt by the jury. The court then stated:

THE COURT: In pronouncing sentence I do want the parties to know that this is a decision that is extremely agonizing for the Court to make. I have not looked at the points that have been raised lightly, but many of the arguments raised by the defense, of course have been considered heretofore, and the jury have found from the factual

standpoint that the defendant was guilty beyond a reasonable doubt, and I do not disagree with that conclusion of the jury. The one mitigating circumstance is that the defendant has not prior to this time been convicted of any felony, but in view of the enormity of the crime committed, and the Court's feeling that this one circumstance does not overcome the aggravated circumstances, I have made findings to this effect, written findings as required by law. Also I have made conclusions and judgment which have been furnished to the defendant and the State at this time, and I will only at this time read the Court's conclusions and judgment.

The court then read its conclusions and judgment by which Coleman was sentenced to death.

### *C. The Court's Findings*

The court's written Findings reviewed the evidence of the Harstad murder and kidnapping and concluded as to aggravating circumstances:

1. That the aggravating circumstances set forth in Section 95-2206.8, paragraph (7) exists for the reason following:

That the offense of aggravated kidnapping was committed by the defendant and it resulted in the death of the victim, Miss Peggy Harstad.

The findings also discussed the mitigating circumstances listed in Mont. Code Ann. § 95-2206.9. As to the



first factor, that "the defendant has no significant history of prior criminal activity," *id.*, the court found:

2. That the State has been unable to prove by means of record checks that the defendant has any other history of criminal activity. The only other criminal act which appears in the trial record in this cause is aggravated burglary of a home in Roundup, Montana, where certain guns were stolen by the defendant and Robert Nank on July 4, 1974. By reason of the foregoing, the credit in mitigation allowed by Section 95-2206.9(1) is not appropriate to this defendant.

As to the remaining mitigating circumstances listed in the Montana Code, *id.* § 95-2206.9(2) to (8), including whether "any other fact exists in mitigation of the penalty," *id.* (8), the court found:

3. That there is no evidence appearing, either in the record of the trial held in this cause or the special sentencing hearing accorded, supporting a finding of any of the circumstances in mitigation under the other numbered paragraphs of Section 95-2206.9, mainly paragraphs (2) through (8).

The court found, among other things, that the offenses were not committed while the defendant was under the influence of any mental or emotional disturbance, the defendant was not a minor, and was a willing participant in the crimes.

In its Conclusions, the court stated:

2. That none of the mitigating circumstances listed in Section 95-2206.9 R.C.M. are sufficiently substantial to call for leniency. That the only mitigating circumstance technically present in this cause is that the defendant has no record history of prior criminal activity.



### 1. *Consideration of Mitigating Circumstances*

Coleman first argues that the trial court failed to consider mitigating circumstances dealing with his personal history and characteristics. Although he did not present any evidence as to mitigating circumstances at the sentencing hearing, see *Darden v. Wainwright*, 106 S. Ct. 2464, 2474 (1986) (similar decision at death sentence hearing); *Baldwin v. Alabama*, 105 S. Ct. 2727 (1985) (*passim*, same); *Williams v. Oklahoma*, 358 U.S. 576, 583 (1959) (same), the pre-sentence report listed several factors which Coleman argues militated in favor of leniency, including: his community service, clean record, and alleged psychological disorders. The trial court stated that it had considered all of the evidence and materials presented in rendering its Findings. See also *Coleman II*, 185 Mont. 299, 605 P.2d at 1019 (rejecting contention that trial court did not give "proper consideration to evidence when making its findings").

State court findings of fact arrive at a federal habeas corpus proceeding with a "presumption of correctness." *Wainwright v. Goode*, 464 U.S. 78, 85 (1983) (*per curiam*). This presumption applies both to state trial and appellate court findings of fact, *id.* (involving state appellate court's interpretation of trial court proceedings in imposing death sentence), and may only be overcome by "'convincing evidence.'" *Kennick v. Superior Court*, 736 F.2d 1277, 1281 (9th Cir. 1984) (quoting 28 U.S.C. § 2254(d)).

The record reveals that the trial court considered all of the evidence and arguments presented regarding mitigation, but found that there was no evidence of mitigating factors sufficiently substantial to call for leniency. At

the June 14<sup>th</sup> hearing, the court stated that it had received the pre-sentence report and noted that "the significant part of it relative to mitigating circumstances, is that the defendant has never been convicted of any felony prior to this charge." The trial court then agreed to accept a brief from the State and from Coleman's counsel specifically discussing the relevant aggravating and mitigating circumstances. *Coleman III*, 633 P.2d at 632. At that hearing and again at the later July 10<sup>th</sup> hearing, the court stated several times, without challenge, that it had read and considered all materials submitted. The court's Findings similarly stated it had reviewed "all matters submitted, together with the evidence produced at trial, and . . . [observed] the defendant's demeanor during trial and while testifying. . . ." Finally, at the July 10<sup>th</sup> hearing, Coleman's attorney reviewed for the court the circumstances from his client's personal history favoring leniency, and the State argued in rebuttal. In light of the trial court's repeated and unchallenged statements that it had received and considered all evidence presented, its specific reference to the presentence report, its acceptance of written briefs and oral argument regarding mitigating circumstances, and Coleman's decision to proceed on the basis of the written record, see *Williams v. Oklahoma*, 358 U.S. at 583 (and cases cited *supra* with full cite to this case), we conclude that the trial court considered all of the mitigating circumstances presented and concluded these factors were not sufficiently substantial to call for leniency.<sup>8</sup>

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<sup>8</sup> The dissent argues that "it is clear from the record and from the written findings that the judge failed to give any

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Coleman maintains, however, that the trial court's failure to discuss his personal history and characteristics in its Findings indicates the court did not consider these factors in sentencing. In a series of cases, the Eleventh Circuit has rejected the same argument. *Johnson v. Wainwright*, 778 F.2d 623, 629 (11th Cir. 1985); *Funchess v. Wainwright*, 772 F.2d 683, 693 (11th Cir.), *reh'g denied en banc*, 776 F.2d 1057 (1985), *cert. denied*, 106 S. Ct. 1242 (1986); *Raulerson v. Wainwright*, 732 F.2d 803, 805-08 (11th Cir.), *reh'g denied*, 736 F.2d 1528 (11th Cir.), *cert. denied*, 105 S. Ct. 366 (1984); *Palmes v. Wainwright*, 725 F.2d 1511, 1523 (11th Cir.), *reh'g denied*, 729 F.2d 1468 (11th Cir.), *cert. denied*, 105 S. Ct. 227 (1984); *Dobbert v. Strickland*, 718 F.2d 1518, 1523-24 (11th Cir.) (*Dobbert II*), *reh'g denied*, 720 F.2d

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consideration whatsoever to . . . Coleman's underprivileged and harsh childhood and adolescence, his military service, his good reputation in his neighborhood, his community service, and his psychological disorders." (Reinhardt, J. dissent at page 682). Further: "The record before us reveals that the court simply was unaware of or failed to consider Coleman's character and background." *Id.* at 684. Finally, the dissent claims the majority is speculating "as to what the sentencing judge actually considered." *Id.* at 691. This is not the case. The record affirmatively establishes that the sentencing judge read and considered the pre-sentence report. That report contained all of the circumstances the dissent argues the court should have considered. To suggest that the court must have been unaware of, or failed to consider, portions of a report which the court stated it had read and considered, not only speculates as to errors of omission the court may have committed, but flies directly in the face of the record. On the record before us, we cannot speculate that the sentencing judge omitted to do that which he tells us he did.

1294 (1983), *cert. denied*, 468 U.S. 1220 (1984). In *Dobbert II*, the court held:

The fact that the sentencing order does not refer to specific types of non-statutory 'mitigating' evidence petitioner introduced indicates only the trial court's finding the evidence was not mitigating, not that such evidence was not considered. Whether particular evidence, such as the fact that Dobbert had a difficult childhood, is mitigating depends on the evidence in the case as a whole and the views of the sentencing and reviewing judges. What one person may view as mitigating, another may not. Merely because the Florida courts, operating through a properly drawn statute with appropriate standards to guide discretion, do not share petitioner's view of the evidence reveals no constitutional infirmity. See *Proffitt v. Florida*, 428 U.S. at 258-59, 96 S. Ct. at 2969-70.

718 F.2d at 1524.

In *Funchess*, 772 F.2d 683, the trial judge's "Findings of Fact" were virtually identical to those made here. The judge in *Funchess* did not refer to the non-statutory mitigating factors, and stated "that sufficient aggravating circumstances exist . . . and this Court further finds that there are insufficient mitigating circumstances to outweigh the aggravating circumstances." 772 F.2d at 693 n.11. The Eleventh Circuit rejected *Funchess*' argument that the trial judge's "failure to discuss any aspect of the non-statutory mitigating circumstances is absolute proof that the trial judge failed altogether to consider these factors:"

During the second resentencing hearing, *Funchess* presented evidence relating to certain non-statutory mitigating circumstances. The trial court considered this evidence but obviously was not persuaded that it justified the establishment of any non-

statutory mitigating factors. Consequently, the trial judge did not include a detailed discussion regarding these alleged circumstances in his findings of fact. This court has on previous occasions held that "[t]he fact that the sentencing order does not refer to specific types of non-statutory 'mitigating' evidence petitioner introduced indicates only the trial court's finding the evidence was not mitigating, not that such evidence was not considered." [*Raulerson*, 732 F.2d at 807]. Accordingly, appellant's argument on this matter is without merit.

*Id.* at 693 (footnotes omitted).

We agree with the Eleventh Circuit that a trial judge's failure to discuss a defendant's personal history in its findings does not indicate that these factors were not considered. Montana's death penalty statute authorizes the trial judge to consider a defendant's personal history and characteristics, and lists as a mitigating circumstance "[a]ny other fact exist[ing] in mitigation of the penalty." Mont. Code Ann. §§ 95-2206.7 and 95-2206.9(8). That the trial judge did not refer to evidence of personal history in his Findings only indicates he found that this evidence did not mitigate the penalty and was not "sufficiently substantial to call for leniency." *Id.* § 95-2206.10. Indeed, the trial judge's comments at the July 10th hearing and his Findings expressly stated that this was his view. We must therefore reject Coleman's argument as inconsistent with the trial judge's own comments, a fair reading of the record, and the analysis enunciated by the Eleventh Circuit which we find persuasive.

## 2. Discussion of Coleman's Personal History

Coleman argues that even if the trial court considered all of the evidence presented and found it insufficient to justify leniency, the due process clause



nevertheless *requires* the sentencing authority to specifically discuss this evidence in its findings. We disagree.

The Supreme Court has emphasized that death, in its finality, is qualitatively different from any other punishment. *See, e.g., Gardner v. Florida*, 430 U.S. 349, 357-58 (1977). The Court has recognized that although sentencing will often involve the exercise of discretion, "that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Godfrey v. Georgia*, 446 U.S. 420, 427 (1981)(citation omitted); *see also Lockett*, 438 U.S. at 604 (state death penalty statute may not preclude sentencing authority from considering defendant's character). In *Lockett*, the Court held violative of due process an Ohio statute which only permitted consideration of three mitigating circumstances. The Court reasoned that the sentencer must not be "precluded from considering, as a mitigating factor, any aspect of a defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death." *Id.* at 604 (emphasis in original). Similarly, in *Eddings v. Oklahoma*, 455 U.S. 104 (1982), the Court overturned a death sentence because the trial judge held it was precluded under Oklahoma law from considering the petitioner's violent background as a mitigating circumstance. *Id.* at 109. The Court concluded "it was clear that the trial judge did not evaluate the evidence in mitigation and find it wanting as a matter of fact; rather he found that *as a matter of law* he was unable even to consider the evidence." *Id.* at 113 (emphasis in original). The Court noted that "the Oklahoma death penalty statute permits the defendant to present evidence 'as to any mitigating circumstances'. . . . *Lockett requires the sentencer to listen.*"



*Id.* at 115 n.10 (citation omitted). See also *Skipper v. South Carolina*, 106 S. Ct. 1669, 1670-71 (1986).

While *Lockett* and *Eddings* hold that the sentencing authority may not impose restrictions, as a matter of law, on the evidence presented by the defendant in mitigation, "[n]either of these cases establishes the weight which must be given to any particular mitigating evidence, or the manner in which it must be considered; they simply condemn any procedure in which such evidence has no weight at all" *Barclay v. Florida*, 463 U.S. 939, 961 n.2 (1983)(Stephens and Powell, J. concurring); *Johnson*, 778 F.2d at 629; *Raulerson*, 732 F.2d at 805-08; *Palmes*, 725 F.2d at 1523. The Court in *Eddings* emphasized that the error in that case was the trial court's self-imposed *legal* restrictions on the consideration of evidence presented in mitigation. 455 U.S. at 113-15. The Court carefully noted, however, that once the state courts admit evidence presented in mitigation, the "sentencer, and the [state court of appeals] on review, may determine the weight to be given relevant mitigating evidence." *Id.* at 114-15. The due process clause only precludes these courts from "giv[ing] it no weight by excluding such evidence from their consideration." *Id.* at 115. See also *Skipper*, 106 S. Ct. at 1670-71; *Spaziano*, 468 U.S. at 467 (federal court does not ask whether it agrees with state courts, only whether decision is "irrational or arbitrary"); *Raulerson*, 732 F.2d at 806-08.<sup>9</sup>

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<sup>9</sup> In *Raulerson*, the court rejected an argument similar to that presented by Coleman on facts virtually identical to those here:

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The Court's approval of various death penalty statutes demonstrates that the due process clause does not impose the requirement that Coleman would have us adopt. In *Jurek*, 428 U.S. 262, the Court upheld a Texas statute which required the jury to answer three general questions regarding mitigating and aggravating circumstances;<sup>10</sup> if the jury was unanimous, it could simply

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A careful examination of *Eddings* reveals that the Constitution prescribes only that the sentencer hear and consider all the evidence a defendant chooses to offer in mitigation. There is no requirement that the court agree with the defendant's view that it is mitigating, only that the proffer be given consideration.

...

In summary, *Lockett* stands for the proposition that the sentencer must *consider* all mitigating evidence. After so doing, it then is generally free to accord that evidence such weight in mitigation that it deems fit.

*Id.* at 807-08 (emphasis in original).

<sup>10</sup> The questions were:

- (1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
- (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
- (3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

428 U.S. at 269.

answer "yes" or "no" to these inquiries. *Id.* at 269 & n.5. The statute imposed no requirement that the jury provide findings discussing mitigating factors which it had rejected. See *Martin v. Maggio*, 711 F.2d 1273, 1286-87 (5th Cir. 1983) (affirming, *Martin v. Blackburn*, 521 F. Supp. 685, 715 (E.D. La. 1981)), *reh'g denied*, 739 F.2d 184 (5th Cir.), *cert. denied*, 105 S. Ct. 447 (1984). The Court emphasized that the Texas statute provided for prompt judicial review, and was constitutional because it assured "that sentences of death will not be 'wantonly' or 'freakishly' imposed. . . ." *Jurek*, 428 U.S. at 276 (citation omitted). Similarly, in *Gregg*, 428 U.S. 153, the Georgia statute required the sentencing authority to consider the list of aggravating circumstances provided in the statute and to consider any mitigating evidence presented by the defendant; if the verdict was death, the judge or jury was required to specify the aggravating circumstances found. *Id.* at 166, 197. The statute imposed no obligation on the sentencing authority to discuss mitigating factors presented but found insufficient to justify leniency. See *id.* at 163-67 & n.n.4-10 (quoting Georgia statute); *id.* at 197. The Court noted that the possibility of arbitrariness was reduced by requiring the state appellate court to examine whether the sentence was "excessive" and whether the evidence supported the jury's or judge's findings. *Id.* at 166-67, 206-07. The Court has approved other sentences in which the trial judge has made findings but not discussed factors dealing with a defendant's personal history considered by the judge but rejected. See *Baldwin*, 105 S. Ct. at 2731; *Spaziano*, 468 U.S. at 466-67 (involving Florida statute, which, like Montana's required judge to

list findings); *Proffitt*, 428 U.S. at 247, 250, 253 (same, noting state appellate review).

The record in this case does not indicate that the trial court imposed any restrictions on the introduction or consideration of evidence in mitigation. Rather, as noted, the court considered the evidence and materials presented and concluded that the factors in mitigation did not outweigh the seriousness of Coleman's offense. On appeal, the Montana supreme court found that the trial court had followed the Montana death penalty statute, *Spaziano*, 448 U.S. at 467, and evaluated the record to determine whether the evidence supported the trial court's Findings. Mont. Code Ann. § 95-2206.13. See *Gregg* 428 U.S. at 207. The Montana supreme court weighed the evidence and found no error:

[The pre-sentence] report indicated the defendant had no record of criminal activity and had been an accepted member of the community where he lived prior to July 4, 1974, the date of the commission of this crime. The evidence in this case supporting the finding of the aggravating circumstance established that the defendant had been a deliberate, voluntary participant in the kidnapping and subsequent rape and murder of the victim. The evidence further established that the death of the victim occurred after a sexual assault, not in a moment of passion, but over a period of time with the defendant first bludgeoning, then attempting to strangle, then finally drowning the victim in an effort to effectuate a deliberate decision to kill Peggy Harstad. Against the record of this brutal crime, we cannot say that the defendant's lack of prior criminal activity of record is a factor sufficiently substantial to call for leniency.

*Coleman II*, 185 Mont. 299, 605 P.2d at 1019.

Due process requires that the state trial and appellate courts listen. *Eddings*, 455 U.S. at 115 n.10. The Montana courts have listened and rendered their judgment. "Whether or not 'reasonable people' could differ over the results here, we see nothing irrational or arbitrary about the imposition of the death penalty in this case." *Spaziano*, 468 U.S. at 467.

### 3. *Consideration of Roundup Burglary*

Coleman next argues that the trial court's consideration of Nank's trial testimony implicating Coleman in the Roundup burglary violated due process. His argument is two-fold: (a) that uncorroborated testimony about an unconvicted crime may not be used to demonstrate prior criminal activity; (b) that he never had notice of or an opportunity to contest this testimony. See *Skipper*, 106 S. Ct. at 1671 n.1.

#### a. *Nank's Testimony*

The Montana death sentence statute permits the court to consider in mitigation whether the "defendant has no significant history of prior criminal activity." Mont. Code Ann. § 95-2206.9. In *Coleman II*, 185 Mont. 299, 605 P.2d at 1019-20, the Montana supreme court held that this statute permitted the trial court to consider the Roundup burglary in sentencing. We have long held that the due process clause does not preclude the sentencing judge from considering evidence of prior criminal conduct not resulting in a conviction. See, e.g., *United States v. Morgan*, 595 F.2d 1134, 1136 (9th Cir. 1979); *United States v. Miller*, 588 F.2d 1256, 1266-67 (9th Cir. 1978) (citing



authorities from this court, *cert. denied*, 440 U.S. 947 (1979); *Farrow v. United States*, 580 F.2d 1339, 1359-60 (9th Cir. 1978) (en banc); *United States v. Weston*, 448 F.2d 626, 628-34 (9th Cir. 1971), *cert. denied*, 404 U.S. 1061 (1972); *United States v. English*, 421 F.2d 133 (9th Cir. 1970) (per curiam) (*passim*). In *Williams v. New York*, 337 U.S. 241 (1949) (*Williams*), the Court upheld the trial court's consideration, in imposing the death sentence, of some thirty burglaries allegedly committed by the defendant, even though he had not been convicted of these crimes. *Id.* at 244. See also *McMillan*, 106 S. Ct. at 2420 (discussing *Williams*); *Williams v. Oklahoma*, 358 U.S. at 583-84 (consideration of prior record in death sentence); see also *United States v. Wondrack*, 578 F.2d 808, 809-10 n.1 (9th Cir. 1978).

In *Morgan*, 595 F.2d 1134, we noted three due process limitations on a court's use in sentencing of crimes for which a defendant has not been convicted. *First*, a court may not consider evidence obtained in violation of the principles underlying *Gideon v. Wainwright*, 372 U.S. 335 (1963). *Morgan*, 595 F.2d at 1136. *Second*, a court may not consider false information. *Id.* (citing *Townsend v. Burke*, 334 U.S. 736 (1948)). *Third*, a court may not consider information derived solely from a pre-sentence report " 'unless it is amplified by information such as to be persuasive of the validity of the charge there made.' " *Id.* (quoting *Weston*, 448 F.2d at 634). In *United States v. Ibarra*, 737 F.2d 825 (9th Cir. 1984), we expanded upon the second and third limitations expressed in *Morgan* and held that the challenged information is " 'false or unreliable' if it lacks 'some minimal indicium of reliability beyond mere allegation.' " *Id.* at 827 (citation omitted); see also *United States v. Hull*, 792 F.2d 941, 942-43 (9th Cir. 1986).



(applying this standard to evidence of unconvicted crimes; noting abuse of discretion standard to trial court's determination). Contrary to Coleman's contention, our cases have never established any *per se* rule preventing consideration of uncorroborated testimony in imposing sentence. Rather, the controlling inquiry is whether the evidence is minimally reliable. *Id.* at 942. *Accord United States v. Whitten*, 706 F.2d 1000, 1007 (9th Cir. 1983) (evidence for conviction), *cert. denied*, 465 U.S. 1100 (1984). *See also United States v. Florence*, 741 F.2d 1066, 1069 (8th Cir. 1984) (judge may consider uncorroborated hearsay; citing *Farrow*, 580 F.2d at 1360); *United States v. Papajohn*, 701 F.2d 760, 763 (8th Cir. 1983) (same); *United States v. Ray*, 683 F.2d 1116, 1120 (7th Cir.) (same, citing authorities), *cert. denied*, 459 U.S. 1091 (1982); *State v. Koon*, 298 S.E.2d 769, 773 (S.C. 1982) (death penalty context) (disapproved on other grounds in *Skipper*, 106 S. Ct. 1669); *Alvord v. State*, 322 So.2d 533, 538 (Fla. 1975) (same), *cert. denied*, 428 U.S. 923 (1976). *See McMillan*, 106 S. Ct. at 2420 (citing *Williams*, 337 U.S. 241, a death penalty case, and noting that evidence is often considered in discretion of judge without burden allocation or standard of proof).

Nank's testimony regarding the Roundup burglary satisfied this standard. The trial judge observed Nank while he testified and heard his testimony first hand. *See United States v. Cruz*, 523 F.2d 473, 476 (9th Cir. 1975), *cert. denied*, 423 U.S. 1060 (1976). The trial judge also observed Coleman as he testified at the trial and heard him deny any involvement in the burglary. At the July 10th hearing, Coleman's counsel generally denied any involvement by Coleman in prior criminal activities. But he did not challenge the reference to Coleman's participation in the

Roundup burglary in the pre-sentence report or in the trial court's unsigned Findings which were distributed at the beginning of the July 10th hearing. Coleman's counsel declined to call Nank to testify at the sentencing hearing and subjected him to further cross-examination.<sup>11</sup> In addition, the Montana supreme court determined that Nank was corroborated on several points. *Coleman I*, 177 Mont. 1, 579 P.2d at 748 (including Negroid pubic hairs found in the Harstad vehicle and Coleman's fingerprints in the car and purse).

*Presnell v. Georgia*, 439 U.S. 14 (1978) (per curiam), cited by Coleman, does not change our conclusion. There, the jury sentenced the defendant to death. Although the jury did not find that the defendant had committed the necessary aggravating element of forcible rape, the Georgia supreme court sustained the conviction because the evidence would have supported that finding. *Id.* at 15-16. The Court reversed because the jury did not convict the defendant of forceable [sic] rape and the sentence could not be sustained on a theory not accepted by the jury. *Id.* at 16-17. Unlike the Georgia supreme court in *Presnell*, the trial judge here was authorized to enter sentence and determine the existence or nonexistence of aggravating or mitigating circumstances. Mont. Code Ann. §§ 95-2206.6 and 95-2206.10. See *Spaziano*, 468 U.S. 447 (*passim*) (upholding statute permitting trial court to enter sentencing in death penalty). The trial judge, like the jury, found that Coleman had committed aggravated kidnapping.

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<sup>11</sup> We discuss *infra* text following this subsection Coleman's argument that he had no opportunity to contest Nank's testimony regarding the Roundup burglary.

Once the court found this aggravating circumstance, the court determined that Coleman was not entitled to mitigation credit for his otherwise clean record, because of his participation in the Roundup burglary and the enormity of his offense. We find nothing irrational or arbitrary about the trial court's weighing of these factors, *see id.* at 467, nor may we substitute our judgment for that of the Montana courts. *Id.*

b. *Notice and Opportunity*

The Supreme Court has stated that to comply with due process, notice must "apprise the affected individual of, and permit adequate preparation for, an impending hearing." *Memphis Light, Gas & Water v. Craft*, 436 U.S. 1, 14 (1978) (footnote omitted). The record reveals Coleman received adequate notice to prepare for the sentencing court's consideration of the Roundup burglary. The sentencing judge notified counsel for Coleman and the State that the sentencing hearing would be held on June 14th in accordance with Montana's death sentence statute. This statute authorizes the court to consider evidence proffered at trial (and probative on the sentence the defendant should receive) without reintroduction at sentencing. Mont. Code Ann. § 95-2206.7. Both Nank and Coleman had testified at trial concerning the Roundup burglary. Further, the pre-sentence report discussed the Roundup burglary and the report was furnished to Coleman's counsel at the June 14th hearing. Coleman's counsel referred to the contents of this report at the June 14th hearing. Finally, Coleman's counsel received the trial court's unsigned Findings (which referred to the Roundup burglary) at the beginning of the later July 10th hearing. At no time did Coleman's counsel indicate a

desire to re-examine Nank, challenge his testimony other than by oral argument, request a continuance to recall Nank, or take any other steps to attack the claim that Coleman participated in the Roundup burglary. See *Gorham v. Wainwright*, 588 F.2d 178, 180 (5th Cir. 1979); see also *In re Acequia, Inc.*, 787 F.2d 1352, 1360 (9th Cir. 1986) (civil context; discussing notice requirements and counsel's failure to request continuance).

For similar reasons, the record does not support Coleman's claim that he had no opportunity to challenge Nank's testimony. We agree with the Montana supreme court that Coleman "at the first hearing, did not testify in mitigation, declined to examine the officer who prepared the pre-sentence report, and was given an opportunity to submit both further briefs on sentencing and his proposed findings and conclusions." *Coleman III*, 633 P.2d 632. We note also that at the second hearing Coleman again declined the opportunity to challenge Nank's testimony. See also *Coleman II*, 185 Mont. 299, 605 P.2d at 1018.

#### 4. *Distribution of Trial Court's Findings*

Coleman contends that the trial court's preparation of its unsigned Findings before the July 10th hearing violated due process. This argument, however, ignores the trial court's statement at the June 14th hearing:

Now the announcement that the defense does not intend to produce any—call any witness to establish any mitigating circumstances, the Court has before it all matters during the course of the trial, heard the testimony relating to aggravating circumstances and also some mitigating circumstances. . . .

The court then indicated it would "render its findings of fact and will go up on the record that is present in the

absence of any mitigating circumstances presented by the defendant at this hearing." The court also requested proposed findings from the parties. Given the court's statement that it would prepare its Findings, we find unpersuasive the argument that the court's preparation of these findings for the July 10th hearing violated due process. The court did exactly what it said it was going to do, and did so without any objection from Coleman.

##### 5. *Reliance on Undisclosed Information*

Coleman finally argues that he had no knowledge of the statements made by his former counsel at the July 2, 1975 hearing,<sup>12</sup> and that these statements prejudiced the trial court when it pronounced sentence on July 10, 1978.

The record does not support Coleman's contention that he did not know about his counsel's statements of July 2. Coleman was present at the hearing on July 3, 1975. As the Montana supreme court found, Coleman's counsel referred to the sodium amytal examination at that hearing, and indicated Coleman was willing to plead guilty and reconduct the examination before the court. *Coleman IV*, 663 P.2d at 1158-59, 1160. These statements correspond to what was said at the July 2nd hearing—that in context of the plea bargain, the sodium amytal examination refreshed Coleman's memory and he was therefore ready to plead guilty. According to Coleman's former counsel, Coleman had previously "blocked out" his alleged participation in the Harstad murder until he had taken the sodium amytal examination and was willing to

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<sup>12</sup> The contents of that hearing are discussed *supra* in the statement of facts.



repeat the examination before the court. In addition, Coleman cannot now claim undisclosed knowledge of his counsel's attempt to withdraw, because his counsel repeated this request at the July 3rd hearing:

I believe there are certain professional and certain ethical positions both as an individual and as an attorney, and I have indicated to Mr. Nank – or to Mr. Coleman, that if I have to continue in this case if we have to try this case, then there is no way in the world I can state to the jury that he is innocent of deliberate homicide and that he's innocent of sexual intercourse without consent. . . . Now – however, I want the record to be clear that I feel that because of my moral and professional, ethical decisions, that I should be relieved. . . .

The only thing I can do . . . is attack fully the question of whether they can establish aggravated kidnapping.

Further, Coleman has not alleged any facts demonstrating the trial court relied on his counsel's statements in sentencing Coleman. A sentence will be vacated on appeal only if the information presented to the court is (a) false or unreliable, and (b) demonstrably made the basis for the sentence. *United States v. Messer*, 785 F.2d 832, 834 (9th Cir. 1986) (citing authorities). In the context of a request for a writ of habeas corpus, "a motion must be denied unless it affirmatively appears in the record that the court based its sentence on improper information." *Farrow*, 580 F.2d at 1359 (emphasis in original); *United States v. Perri*, 513 F.2d 572, 574 (9th Cir. 1975). See *Gardner*, 430 U.S. 349, 353 (involving reliance by sentencing judge on undisclosed information). The Montana supreme court carefully reviewed the record and found "no indication that the sentencing judge considered



defense counsel's statement or the sodium amytal examination results in sentencing Coleman." *Coleman IV*, 663 P.2d at 1160. See *Goode*, 464 U.S. at 85 (even if sentencing record in death penalty hearing is ambiguous, federal court should defer to state appellate court factual findings in death sentence case). Our independent review of the sentencing hearing transcript and the trial court's Findings fully supports this conclusion.

Coleman in effect urges adoption of a *per se* rule requiring reversal whenever a judge hears inherently prejudicial information and subsequently (here three years later) enters a death sentence. He constructs this argument around our holding in *Lowery v. Cardwell*, 575 F.2d 727 (9th Cir. 1978). In *Lowery*, the defendant was charged with first degree murder and pleaded not guilty. In a trial in which the judge served as the trier of fact, the defendant testified during examination by her counsel and denied shooting the victim. Her counsel immediately requested a recess and a meeting with the judge outside of the defendant's presence. The defendant's counsel moved to withdraw from the case; he did not explain the reason, and the trial court denied the motion. *Id.* at 729. In closing argument, the defendant's counsel did not refer to his client's claims of innocence. The trial judge found the defendant guilty. We reversed, stating: "[I]f, under these circumstances, counsel informs the fact finder of his belief [that his client's defense is based on false testimony] he has, by that action, disabled the fact finder from judging the merits of the defendant's defense." *Id.* at 730. We emphasized in *Lowery* that the "judge, and not a jury, was the fact finder." *Id.* In the present case, a jury, not a judge, was the finder of fact.

The jury never heard Coleman's counsel's comments, and found Coleman guilty of murder and aggravated kidnapping nonetheless. Although the trial judge heard these comments in a plea bargaining context and sentenced Coleman three years later, the sentencing occurred only *after* the jury had found Coleman guilty beyond a reasonable doubt.

Coleman maintains, however, that the trial judge was the fact finder at sentencing and that *Lowery* should be extended to this case. Acceptance of this argument would contradict the requirement, repeatedly expressed in our case law, that to warrant reversal the judge must actually rely on improper information in sentencing. *See, e.g., Messer*, 785 F.2d at 834. This rule is sound and should not be disturbed. A trial judge will often be exposed to, and even consider in sentencing (*see United States v. Mills*, 597 F.2d 693, 699 (9th Cir. 1979)) evidence and accusations which would be wholly inadmissible in a trial on a defendant's guilt or innocence. *See, e.g., Williams*, 337 U.S. 241 (death sentence context); *United States v. Wright*, 593 F.2d 105, 109 (9th Cir. 1979) (illegally seized evidence). The prosecution may attempt to introduce, at sentencing, information which is prejudicial, unreliable or simply false. *See, e.g., Townsend*, 334 U.S. 736; *Weston*, 448 F.2d 626. To hold that a judge may not sentence the defendant because of exposure to such prejudicial information would be unwarranted, especially where, as here, the judge presided over an extensive trial and heard all of the testimony and evidence presented to the jury which found Coleman guilty. *See, e.g., United States v. Montecalvo*, 545 F.2d 684, 685 (9th Cir. 1976) (involving motion

for recusal), *cert. denied*, 431 U.S. 918 (1977); *Commonwealth v. Wilson*, 381 Mass. 90, 407 N.E.2d 1229, 1248-49 (1980) (due process challenge in death penalty case); accord *United States v. Bunch*, 730 F.2d 517, 519 (7th Cir. 1984) (recusal motion). To further conclude that a *violation* of due process has occurred at a sentencing hearing, even though the record reveals no reliance on the prejudicial information, would represent an inappropriate extension of *Lowery* to a different context. The concerns underlying *Lowery* – a defendant's counsel informing the trier of fact at trial of his client's deception – are not present here; nor would an extension of *Lowery* comport with our case law dealing with sentencing or the rationale underlying those cases.<sup>13</sup>

AFFIRMED.

## APPENDIX

95-2206.6. Sentence of death – hearing on imposition of death penalty. When a defendant is found guilty of or pleads guilty to an offense for which the sentence of death may be imposed, the judge who presided at the trial or before whom the guilty plea was entered shall conduct a separate sentencing hearing to determine the existence or nonexistence of the circumstances set forth in 95-2206.8 and 95-2206.9 for the purpose of determining

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<sup>13</sup> Coleman's other contentions regarding the trial court's *sua sponte* amendment of the information to include the kidnapping count, and the trial court's special interrogatory concerning whether the kidnapping had caused the victim's death, are without merit. *Coleman I*, 177 Mont. 1, 579 P.2d at 745-46, 751.

the sentence to be imposed. The hearing shall be conducted before the court alone.

95-2206.7. Sentencing hearing – evidence that may be received. In the sentencing hearing, evidence may be presented as to any matter the court considers relevant to the sentence, including but not limited to the nature and circumstances of the crime, the defendant's character, background, history, mental and physical condition, and any other facts in aggravation or mitigation of the penalty. Any evidence the court considers to have probative force may be received regardless of its admissibility under the rules governing admission of evidence at criminal trials. Evidence admitted at the trial relating to such aggravating or mitigating circumstances shall be considered without reintroducing it at the sentencing proceeding. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

95-2206.8. Aggravating circumstances. Aggravating circumstances are any of the following:

(1) The offense was deliberate homicide and was committed by a person serving a sentence of imprisonment in the state prison.

(2) The offense was deliberate homicide and was committed by a defendant who had been previously convicted of another deliberate homicide.

(3) The offense was deliberate homicide and was committed by means of torture.

(4) The offense was deliberate homicide and was committed by a person lying in wait or ambush.

(5) The offense was deliberate homicide and was committed as a part of a scheme or operation which, if completed, would result in the death of more than one person.

(6) The offense was deliberate homicide as defined in subsection (1)(a) of 94-5-102 and the victim was a peace officer killed while performing his duty.

(7) The offense was aggravated kidnapping which resulted in the death of the victim.

95-2206.9. Mitigating circumstances. Mitigating circumstances are any of the following:

(1) The defendant has no significant history of prior criminal activity.

(2) The offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(3) The defendant acted under extreme duress or under the substantial domination of another person.

(4) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(5) The victim was a participant in the defendant's conduct or consented to the act.

(6) The defendant was an accomplice in an offense committed by another person, and his participation was relatively minor.

(7) The defendant, at the time of the commission of the crime, was less than 18 years of age.

(8) Any other fact exists in mitigation of the penalty.

95-2206.10. Consideration of aggravating and mitigating factors in determining sentence. In determining whether to impose a sentence of death or imprisonment, the court shall take into account the aggravating and mitigating circumstances enumerated in 95-2206.8 and 95-2206.9 and shall impose a sentence of death if it finds one or more of the aggravating circumstances and finds that there are no mitigating circumstances sufficiently substantial to call for leniency. If the court does not impose a sentence of death and one of the aggravating circumstances listed in 95-2206.8 exists, the court may impose a sentence of imprisonment for life or for any term authorized by the statute defining the offense.

95-2206.11. Specific written findings of fact. In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact as to the existence or nonexistence of each of the circumstances set forth in 95-2206.8 and 95-2206.9. The written findings of fact shall be substantiated by the records of the trial and the sentencing proceeding.

95-2206.12. Automatic review of sentence. The judgment of conviction and sentence of death are subject to automatic review by the supreme court of Montana as provided for in 95-2206.13 through 95-2206.15.

95-2206.13. Review of death sentence – priority of review – time for review. The judgment of conviction and sentence of death are subject to automatic review by the supreme court of Montana within 60 days after certification by the sentencing court of the entire record unless



the time is extended by the supreme court for good cause shown. The review by the supreme court has priority over all other cases and shall be heard in accordance with rules promulgated by the supreme court. The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration.

95-2206.14. Transcript and records of trial transmitted. The clerk of the trial court, within 10 days after receiving the transcript, shall transmit the entire record and transcript to the supreme court.

95-2206.15. Supreme court to make determination as to the sentence. The Supreme court shall consider the punishment as well as any errors enumerated by way of appeal. With regard to the sentence, the court shall determine:

(1) whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;

(2) whether the evidence supports the judge's finding of the existence or nonexistence of the aggravating or mitigating circumstances enumerated in 95-2206.8 and 95-2206.9; and

(3) whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. The court shall include in its decision a reference to those similar cases it took into consideration.

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89-187

No. 89-

Supreme Court, U.S.

FILED

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JOSEPH F. SPANGLER, JR.  
CLERK

In The

# Supreme Court of the United States

October Term, 1989

JACK McCORMICK,  
Warden of the Montana State Prison, and  
MARC RACICOT,  
Attorney General of the State of Montana,

*Petitioners,*

v.

DEWEY E. COLEMAN,

*Respondent.*

## APPENDIX VOLUME II PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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FOR PUBLICATION  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

COLEMAN *v.* RISLEY, No. 85-4242

Filed January 19, 1988

REINHARDT, Circuit Judge, dissenting:\*

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## I. INTRODUCTION

The State of Montana is planning to hang Dewey Coleman, a black man who in all likelihood would not be facing execution if he were white. For reasons that are entirely arbitrary and meritless, and have every appearance of being pretextual, the state refused even to consider a plea bargain from Coleman identical in every respect to the one it accepted from his white codefendant,

Nank. This, notwithstanding the fact that Nank was a hardened criminal while Coleman had not been arrested previously and had a record of community service. No court has been willing to afford Coleman a factual hearing on his claim of racial discrimination, despite the clear constitutional mandate to do so.

Coleman's sentencing hearing was little more than a sham and would hardly have been adequate were the issue whether a Little Leaguer should be suspended for one game. His attorney decided to rely solely on oral argument and so advised the sentencing judge well in advance of the sentencing. Yet the judge arrived at the sentencing hearing with his Findings, Conclusions, Judgment and Order of Execution in final form and distributed them to the parties before counsel could speak. Thereafter, in the words of the Montana Supreme Court, Coleman's attorney was permitted to "read into the record a prepared statement. . . ." Furthermore, it appears from the court's own findings that at the time of sentencing the judge was unaware of either the existence or the legal significance of most of the critical mitigating circumstances the Constitution required him to consider. In addition, the judge based the death sentence in part on his finding that earlier on the day of the capital offense Coleman, along with Nank, had committed a lesser unrelated crime - a crime for which he had not been charged, tried, or convicted.

Equally important, the Montana death penalty statute is unconstitutional on its face and as applied to Coleman for a number of reasons. Under the statute the burden of proof was placed on Coleman to show that he had not committed an unadjudicated offense. Perhaps

even more important, the burden was placed on him to show that the mitigating circumstances outweighed the single aggravating circumstance; for, under Montana law, the burden of persuasion on the issue of life or death falls on the accused, not the prosecution. Next, the statute under which Montana seeks to execute Coleman did not even exist when he was first tried, convicted, and sentenced. Every other court that has considered the question has held that the state may not execute a defendant in that circumstance.

Finally, even were one to accept blindly Montana's wholly unpersuasive arguments that race played no part in its decision to execute Coleman, one would still be forced to conclude that the state based its decision to take his life, and spare his codefendant's, on factors that were unrelated to the degree of his criminal culpability or to his individual character or background and, thus, are constitutionally impermissible, and that the quality of the evidence is not such as to afford that degree of reliability that is constitutionally necessary before the state may take a person's life.

Montana insists that all of its actions were lawful. Although, regrettably, the majority of this panel has decided to acquiesce in those actions, I find it impossible to do so. Because I believe that we must not lend the approval of the federal courts to the state's discriminatory and unconstitutional conduct, and because I am persuaded that at the very least Coleman is entitled to an evidentiary hearing, I dissent.

This case obviously presents numerous serious constitutional questions. The Montana Supreme Court has

considered Coleman's pleas on four occasions. All four encounters have resulted in extended opinions and strong dissents concerning a number of important legal issues. *State v. Coleman* (Coleman I), 177 Mont. 1, 579 P.2d 732 (1978); *State v. Coleman* (Coleman II), 185 Mont. 299, 605 P.2d 1000 (1979), cert. denied, 446 U.S. 970 (1980); *Coleman v. State* (Coleman III), 633 P.2d 624 (1981), cert. denied, 455 U.S. 983 (1982); *Coleman v. Risley* (Coleman IV), 663 P.2d 1154 (1982). I will consider here only the legal issues that in my opinion present the most egregious constitutional violations. I have divided those issues into three general categories: those stemming from Coleman's equal protection claim regarding the prosecution's actions; those relating to his constitutional challenge to the sentencing procedure followed in his case; and those pertaining to due process problems presented by the death penalty statute on its face and as applied; also included in the last category is Coleman's eighth amendment claim. Reversal on the first category of issues would require, at the very least, a remand to the United States District Court so that Coleman could be afforded the hearing that he has thus far been denied. Reversal on the second category would require vacation of the death penalty, although the state would be allowed to consider anew all forms of punishment permitted under the state statute. Reversal on the third category of issues would bar imposition of the death penalty altogether.

The review we must afford in a capital case is much stricter than in ordinary criminal proceedings. As the Supreme Court has explained, "although not every imperfection in the deliberative process is sufficient, even in a capital case, to set aside a state-court judgment, the

severity of the sentence mandates careful scrutiny in the review of *any colorable claim of error*." *Zant v. Stephens*, 462 U.S. 862, 885 (1983) (emphasis added). The Court reinforced the point in *Burger v. Kemp*: "Our duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case." 107 S. Ct. 3114, 3121 (1987).

## II. THE PRETRIAL PROCEEDINGS

### A. Introduction

Coleman claims that the prosecution conducted its plea bargaining on an arbitrary and discriminatory basis. He insists that the state should have allowed him to plead guilty and thus avoid the death sentence just as it did his white codefendant, Nank. According to Coleman, racial considerations motivated the arbitrary and unequal treatment.

Coleman presents us today not with a general argument about the discriminatory effect of capital punishment but with a concrete claim of unequal treatment on the basis of race. He does not argue that Montana's death penalty scheme tends to have a disproportionate impact on blacks in general. Compare *McCleskey v. Kemp*, 107 S. Ct. 1756 (1987). He claims, instead, that in his specific case Montana would not have imposed the death penalty on him had he been white. He points to factual circumstances in the record that clearly raise a substantial question as to the state's discriminatory intent, the most significant being the fact that Montana did not treat him in a similar fashion to his similarly situated white codefendant. Unlike the defendant in *McCleskey*, Coleman

offers "evidence specific to his own case that would support an inference that racial considerations played a part in his sentence." *Id.* at 1766-67.<sup>1</sup>

Coleman made more than enough of a showing of unequal and arbitrary treatment to be entitled to a hearing before the United States District Court. That court, however, rejected his claim summarily, as does the majority here. I would, at the very least, remand Coleman's petition on this issue and direct the district court to give his claim the consideration it so clearly deserves.

## B. *Law*

### 1. *General Equal Protection Principles*

There are several reasons why we should give special consideration to Coleman's equal protection claim. First, Coleman is alleging racial discrimination by the state and, as the Court has declared, "[t]he central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race." *Washington v. Davis*, 426 U.S. 229, 239 (1976). Second, Coleman is charging discrimination within the judicial system, which, the Court has declared, "is most pernicious because it is 'a stimulant to that race

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<sup>1</sup> The issue in *McCleskey* was a narrow one. The majority described it succinctly: "This case presents the question whether a complex statistical study that indicates a risk that racial considerations enter into capital sentencing determinations proves that petitioner McCleskey's capital sentence is unconstitutional under the Eighth or Fourteenth Amendment." *Id.* at 1761. The Court held, despite vigorous dissents, *id.* at 1781-1806, that it does not.



prejudice which is an impediment to securing to [black citizens] that equal justice which the law aims to secure all others.' " *Batson v. Kentucky*, 106 S. Ct. 1712, 1718 (1986) (quoting *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880)). Recently, the Court has reiterated this point: "Because of the risk that the factor of race may enter the criminal justice process, we have engaged in 'unceasing efforts' to eradicate racial prejudice from our criminal justice system." *McCleskey v. Kemp*, 107 S. Ct. at 1775 (citation and footnote omitted). Finally, because the case involves capital punishment we must examine carefully the equal protection claim. "The risk of racial prejudice infecting a capital sentencing proceeding," the Supreme Court has said, "is especially serious in light of the complete finality of the death sentence." *Turner v. Murray*, 106 S. Ct. 1683, 1688 (1986) (plurality).

Coleman's equal protection claim is not based upon a facial challenge to the validity of a specific Montana statute but, rather, to the state's administration and application of its laws. The equal protection clause of the fourteenth amendment, of course, does not exclude this type of challenge. It prohibits not only unequal laws but also unequal application and administration of laws. "Though the law itself be fair on its face and impartial in appearance," the Court declared many years ago, "yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution." *Yick Wo v. Hopkins*, 118 U.S. 356, 373-374 (1886).

To succeed in his equal protection challenge of his death penalty Coleman must prove discriminatory purpose. The Court has imposed that requirement on all claims it has considered under the equal protection clause. See, e.g., *Wayte v. United States*, 470 U.S. 598, 608-09 (1985) (selective prosecution claim); *Personnel Administrator of Mass. v. Feeney* 442 U.S. 256, 271-72 (1979) (claim of sex discrimination against state law giving veterans an absolute lifetime preference in government employment); *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977) (racial discrimination claim against zoning plan); *Washington v. Davis*, 426 U.S. 229, 239-40 (1976) (racial discrimination claim against employment test). Recently, the Court has specifically applied "the basic principle that a defendant who alleges an equal protection violation has the burden of proving 'the existence of purposeful discrimination' " in a capital punishment case. *McCleskey v. Kemp*, 107 S. Ct. at 1766 (quoting *Whitus v. Georgia*, 385 U.S. 545, 550 (1967)) (footnote omitted). Like the defendant in *McCleskey v. Kemp*, "to prevail under the Equal Protection Clause," Coleman "must prove that the decision-makers in his case acted with discriminatory purpose." *Id.* (emphasis in original).

A finding of discriminatory purpose requires an examination of all the relevant surrounding circumstances and an inference of discrimination from them. "Necessarily," the Court said in *Washington v. Davis*, "an invidious discriminatory purpose may often be inferred from the totality of the relevant facts. . . ." 426 U.S. at 242. The Court reiterated this point in *Arlington Heights v. Metropolitan Housing Development Corp.*: "Determining

whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." 429 U.S. at 266. The person alleging discriminatory intent must point to behavior – sometimes verbal but usually non-verbal – that suggests the existence of a discriminatory motivation.

Coleman does not have to show that racial discrimination was the dominant motivation underlying the prosecution's actions, let alone the only motivation. Evidence that racial discrimination played any part whatsoever in the state's decision is sufficient. In *Arlington Heights v. Metropolitan Housing Development Corp.*, the Court explained:

*Davis* does not require a plaintiff to prove that the challenged action rested solely on racially discriminatory purposes. . . . [R]acial discrimination is not just another competing consideration. When there is proof that a discriminatory purpose has been a *motivating factor* in the decision, this judicial deference is no longer justified.

429 U.S. at 265-266 (footnotes omitted) (emphasis supplied).

While claimants often point to a pattern of official discrimination to support their equal protection claims, see, e.g., *McCleskey v. Kemp*, 107 S. Ct. 1756; *Wayte v. United States*, 470 U.S. 598; *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256; *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252; *Washington v. Davis*, 426 U.S. 229, they of course may rely on the facts of their own case to show discriminatory intent:

"a consistent pattern of official racial discrimination" is not "a necessary predicate to a violation of the Equal Protection Clause. A single invidiously discriminatory governmental act" is not "immunized by the absence of such discrimination in the making of other comparable decisions." [*Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. at 266 n.14. For evidentiary requirements to dictate that "several must suffer discrimination" before one could object, *McCray v. New York*, 461 U.S. 961, 965 (Marshall, J., dissenting from denial of certiorari), would be inconsistent with the promise of equal protection to all.

*Batson v. Kentucky*, 106 S. Ct. at 1722. In fact, as *McCleskey* clearly tells us, in determining whether racial considerations have affected a prosecutor's decision to seek the death penalty, the court must look primarily to the facts and circumstances surrounding the specific prosecutorial decision involved.

In *Arlington Heights v. Metropolitan Housing Development Corp.*, the Court identified some of the circumstantial evidence that is relevant when discriminatory intent is at issue:

The historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes. The specific sequence of events leading up to the challenged decision also may shed some light on the decision-maker's purposes. . . . Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role. Substantive departures too may be relevant, particularly if the factors usually considered important by the decision-maker strongly favor a decision contrary to the one reached.

429 U.S. at 267 (citations omitted). *Arlington's* enumeration of relevant evidentiary sources is, of course, not

exhaustive. *Id.* at 268. But the listing suggests that we must undertake a broad and deep examination of the specific circumstances of Coleman's case in order to decide whether the imposition of the death penalty violated the equal protection clause. The key inquiry here must be as to the prosecutor's motives in repeatedly and vigorously refusing to accept, or even consider accepting, Coleman's guilty plea – and our examination must be – I would remind my colleagues – a "sensitive" one. *Id.* at 266.

## 2. Equal Protection Challenges of Plea Bargaining

There is wide prosecutorial discretion regarding plea bargaining, and the Court has explicitly rejected the contention "that a criminal defendant has an absolute right to have his guilty plea accepted by the court." *Lynch v. Overholser*, 369 U.S. 705, 719 (1962). See also *Santobello v. New York*, 404 U.S. 257, 263 (1971); *North Carolina v. Alford*, 400 U.S. 25, 34-35 (1970). Though recognizing the risks associated with the prosecutors' discretion in conducting plea bargaining in death penalty cases, the Court in *McCleskey* once again reminded us of the importance of such discretion:

As we have noted, a prosecutor can decline to charge, offer a plea bargain, or decline to seek a death sentence in any particular case. . . . Of course, "the power to be lenient [also] is the power to discriminate," K. Davis, *Discretionary Justice* 170 (1973), but a capital-punishment system that did not allow for discretionary acts of leniency "would be totally alien to our notions of criminal justice." *Gregg v. Georgia*, 428 U.S. [153,] 200 n.50 [(1976).]

*McCleskey v. Kemp*, 107 S. Ct. at 1777.



It is equally true that the judiciary's deference to prosecutorial discretion in plea bargaining is by no means absolute, and that courts must ensure that racial considerations play no part in the plea-bargaining process. In *Bordenkircher v. Hayes*, 434 U.S. 357 (1978), Justice Stewart – writing for the Court – stated:

There is no doubt that the breadth of discretion that our country's legal system vests in prosecuting attorneys carries with it the potential for both individual and institutional abuse. And broad though that discretion may be, there are undoubtedly constitutional limits upon its exercise.

*Id.* at 365 (footnote omitted). *Bordenkircher*, quoting *Oyler v. Boles*, 368 U.S. 448, 456 (1962), reiterated the fundamental limitations that the equal protection clause imposes on the prosecutor's conduct of plea bargaining. "Within the limits set by the legislature's constitutionally valid definition of chargeable offenses, 'the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation' so long as 'the selection was [not] deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.'" 434 U.S. at 364 (quoting *Oyler v. Boles*, 368 U.S. at 456) (emphasis supplied). *Wayte v. United States*, restates the principle that the exercise of prosecutorial discretion on the basis of race is unconstitutional:

[A]lthough prosecutorial discretion is broad, it is not " 'unfettered.' Selectivity in the enforcement of criminal law is . . . subject to constitutional constraints." *United States v. Batchelder*, 442 U.S. 114, 125 (1979) (footnote omitted). In particular, the decision not to prosecute may not be " 'deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification . . . ' " [*Bordenkircher v. Hayes*,



343 U.S. at 364 (quoting *Oyler v. Boles*, 368 U.S. at 456).]

470 U.S. at 608.

Recently, in *McCleskey*, in the context of a challenge to a prosecutor's decision to seek the death penalty, the Court, citing the applicable portion of *Wayte*, reaffirmed the principle that racial considerations must play no part in a prosecutor's exercise of his discretion, noting that it "has repeatedly stated that prosecutorial discretion cannot be exercised on the basis of race." 107 S. Ct. at 1775 n.30 (citing *Wayte v. United States*, *United States v. Batchelder*, and *Oyler v. Boles*). See also *United States v. Lee*, 786 F.2d 951, 957 (9th Cir. 1986). The decision to reject a guilty plea and compel a defendant to submit to trial on a capital charge is thus indisputably subject to the same constitutional rule as all other prosecutorial decisions: the decision may not be influenced in any measure by the race of the defendant.

The most recent Supreme Court opinion reviewing a challenge to prosecutorial discretion based on the prosecutor's specific conduct in the particular case is *Batson*. In *Batson*, the Court held that the state's exercise of its traditional privilege to strike individual jurors through peremptory challenges is subject to the constraints of the equal protection clause. 106 S. Ct. at 1718-19. Defendants are entitled, the Court ruled, to a reversal of their convictions if they can show that the prosecution exercised its peremptory challenges in a discriminatory manner. *Id.* at 1725. By the same token, a showing that the prosecution's decision to reject Coleman's plea and to seek a capital sentence instead was racially motivated would necessitate reversal of his death penalty.

In a recent noncapital punishment case, *United States v. Moody*, 778 F.2d 1380 (9th Cir. 1985), we reiterated the previously established limitations on a prosecutor's discretion in plea bargaining. The defendants in *Moody* claimed that the prosecution engaged in impermissible discrimination by affording a plea bargain to their co-conspirator and not to them. In rejecting defendants' claim, we stated:

We have held that a defendant who relies on contentions of impermissibly selective prosecution must demonstrate "that he was selected for prosecution on the basis of an impermissible ground such as *race*, religion or exercise of the constitutional rights."

*Id.* at 1386 (emphasis supplied) (quoting *United States v. McWilliams*, 730 F.2d 1218, 1221 (9th Cir. 1984) (per curiam)). While we concluded that the defendants in that case did not show "that the government was motivated by considerations of race, religion, or any other impermissible ground." *id.*, we nonetheless, made it clear that if the prosecution bases its plea bargaining decisions on the race of the defendants, the courts will intervene. The Montana Supreme Court's decision in *Coleman I*, 177 Mont. 1, 21, 579 P.2d 732, 744-45 (1978) is contrary to the rule we announced and cannot stand.<sup>2</sup>

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<sup>2</sup> In rejecting *Coleman's* appeal, the Montana Supreme Court erroneously held that the prosecution and trial court have absolute discretion in deciding whether to accept a guilty plea. *Coleman I*, 177 Mont. 1, 21, 579 P.2d 732, 744-45 (1978). The court concluded that the United States Supreme Court's opinions on plea bargaining do not impose any limitations on the state prior to the time it has decided to accept a plea - that

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When reviewing a state's decision to reject a defendant's plea and seek the death penalty, we must keep in mind generally the importance of preserving the prosecution's traditional discretion. Yet at the same time we must make certain that racial considerations played no part in the exercise of that discretion in the particular case. If Coleman can show that racial considerations were a factor in the prosecutors' decision not to accept his proffered plea, he is entitled to prevail on his equal protection claim.

### C. *Facts*

#### 1. *The Evidence Available*

In this case, there were two defendants: Dewey Coleman and Robert Dennis Nank. At the time of the arrest, Coleman was 27 years old. A black man, originally from Missouri, Coleman had never been arrested before and had no history of violent behavior. He had served in the United States Navy and, upon his discharge, played a substantial role in community service programs in his neighborhood. Coleman testified that he was homosexual. He had been treated for depression at a Veteran's Administration hospital shortly before the crime

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the decisions serve only to establish rules governing when the state must comply with a bargain it has previously made and when the state cannot enforce such a bargain. "These cases," the Montana Supreme Court insisted, "do not require the trial court or the prosecution to accept a guilty plea. The acceptance of a guilty plea to a charged offense is within the discretion of the trial court." The Montana Supreme Court, without any further explanation or discussion, dismissed Coleman's claim that the plea bargaining in his case was racially motivated.

occurred. He had met codefendant Nank only one month prior to Peggy Harstad's murder.

Nank, a white man, had a history of violence including attacks on both his mother and his sister. He had a long list of prior arrests and several felony convictions. In addition, Nank admitted to a pattern of sexual deviance involving women.

The only direct evidence available in this case was the testimony of the two accused. They only agree on how the story began. The motorcycle Coleman and Nank were riding ran out of gas on the highway when they were en route to Forsyth, Montana. They then tried, without immediate success, to hitchhike to a gas station. At this point, the two accounts diverge.

Nank's testimony presented the remaining facts as follows: Peggy Harstad, the victim, a white Montana resident, stopped and gave Nank and Coleman a ride. While driving down the road, Nank reached over, turned the key off, and steered the car to a stop. Nank forced Harstad into the back seat and, while Coleman drove, disrobed her and tried without success to rape her. After Nank's failed attempt, Coleman raped Harstad while Nank physically restrained her and held on to her foot. (Nank testified that he had a foot fetish.) The two took her to the Yellowstone River where Nank and Coleman drowned her, Nank holding her head down in the water while Coleman held her legs. Earlier Coleman had beaten her with his motorcycle helmet and tried, with Nank's help, to strangle her with a yellow rope. After the murder, Coleman and Nank drove the victim's car toward Forsyth until they ran out of gas. They walked the rest of

the way to Forsyth and bought gasoline. Nank then hitched a ride to where the motorcycle was and rode it back to Forsyth to fetch Coleman.

Coleman, on the other hand, gave the following account: After their initial failure to get a ride, Nank suggested that he might be more successful in getting one without Coleman, pointing out that few black people lived in Montana. Coleman withdrew from sight and Nank hitched a ride. Coleman waited by the highway for Nank to return. Several hours later Nank appeared, driving a car, wet, upset, and acting strangely. Nank told Coleman to abandon the motorcycle and get in the car. When he did, Nank told Coleman that he had killed a woman. Nank drove the car until it ran out of gas. They then walked to Forsyth. On the way, Nank gave Coleman a purse, which Coleman opened, looked through, and then threw away. At Forsyth, they bought gasoline and, after Nank retrieved their motorcycle, continued on their way. Nank warned Coleman that if he ever told anyone about the murder, Nank would kill him too.

The prosecution presented no direct evidence, other than Nank's testimony, concerning Coleman's actions. But the prosecution contended that the following five points corroborated Nank's story: (1) a crack in Coleman's motorcycle helmet, (2) strands of Harstad's hair found in a rope in the apartment of the two men, (3) Coleman's fingerprints on the car and on a paper in Harstad's purse, (4) negroid head and pubic hairs found in Harstad's abandoned car, and (5) the presence of Coleman and Nank in the vicinity on the day of the crime. *Coleman I*, 177 Mont. 1, 28, 579 P. 2d 732, 748 (1978).



Justice Morrison, in his dissent in *Coleman III*, 633 P.2d 624, 633 (1981)(Morrison, J., dissenting), *cert. denied* 455 U.S. 983 (1982), pointed out that not one of the five facts reliably corroborated the disputed parts of Nank's story. The victim's hair in the rope, Coleman's fingerprints on the car and on the paper within the victim's purse, negroid head hair in the car, and the fact that the two were seen together on the road about the time of the victim's disappearance, Justice Morrison reasoned, were fully consistent with Coleman's testimony. 633 P.2d at 635. The crack in the motorcycle helmet, according to Justice Morrison, was meaningless. He noted that there was no testimony that a motorcycle helmet would crack if used to strike someone and no testimony that the helmet could have cracked without fracturing the victim's skull; he also noted that there was unrebutted testimony that there was no evidence of any injury to the head. 633 P.2d at 635-36. The only evidence tending to corroborate Nank's as opposed to Coleman's version is the fact that two negroid pubic hairs were found in the victim's car. Justice Morrison insisted, however, that the state's expert testimony on the pubic hairs "was to [sic] speculative to be received in evidence, and once received, could not be relied upon as sufficiently corroborative to sustain a conviction." 633 P.2d at 637.

Justice Morrison noted that Nank's testimony should be viewed with suspicion in light of the "strong motive for lying." *Id.* at 634. Before making his confession, Nank demanded that law enforcement officials provide him some assurance that he would not be executed. The level of corroboration required under these circumstances, according to Justice Morrison, was certainly not met by --



the thin circumstantial evidence introduced by the prosecution.

After reviewing the evidence, Justice Morrison concluded:

A defendant is here sentenced to die where there is practically no credible evidence connecting the defendant to the commission of the crime. There are strong reasons to believe that the defendant did not commit the crime for which the death penalty was imposed. And yet this Court is authorizing the imposition of that irrevocable sanction. I implore the federal courts to examine this record, and upon finding it to be as wanting as I do, to intervene and prevent this gross injustice.

*Coleman III*, 633 P.2d at 641 (Morrison, J., dissenting). Justice Shea agreed with Justice Morrison that Coleman's conviction should have been reversed. "Although dismissal is the proper ruling," Justice Shea added, "even in the event of a failure to dismiss, the evidence of corroboration of accomplice Nank's testimony is so thin that a death penalty should not be imposed." *Id.* at 641 (Shea, J., dissenting).

More important, both before and after the prosecution presented its witnesses, the trial judge expressed skepticism about the strength of the prosecution's case. During pretrial proceedings, the judge urged the prosecution to take Coleman's guilty plea, in part because proving his guilt would be very difficult on the basis of the evidence available. At the close of the government's case, Coleman moved for dismissal or judgment of acquittal. The judge told the prosecution that he would treat Coleman's motion "as a real serious motion". The judge said that the motion had some merit and added: "Well, all you

have shown is the opportunity for this black boy to do it. You have shown plenty of opportunity."<sup>3</sup>

It seems beyond dispute that the prosecution did not have a strong case against Coleman, either at the time it refused to consider accepting his plea or afterwards. Its case was based on the testimony of an accomplice and was at best sparsely corroborated by the limited circumstantial evidence available. Nank's testimony was shot through with inconsistencies and retractions from his earlier accounts. At trial he discarded his own previous stories as lies. *Coleman III*, 633 P.2d at 633-37 (1981) (Morrison, J., dissenting). In addition, Nank's prior felony convictions served further to undermine his credibility.

## 2. *The Plea Bargaining Hearings*

On May 7, 1975, the state accepted Nank's offer to plead guilty to the noncapital charges of deliberate homicide and solicitation to commit sexual intercourse without consent. Nank agreed, in addition, to testify against Coleman at trial. The state, in return, agreed to dismiss the charge of aggravated kidnapping against Nank and, thus, spare him the possibility of capital punishment.

Coleman, through his counsel, offered a plea bargain similar to that of Nank's less than two weeks later. On May 23, defense counsel presented the offer to the court

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<sup>3</sup> See *infra* text accompanying note 13 for discussion of the significance of the racial aspect of this comment.

in writing. Even in its initial form, Coleman's offer differed from Nank's only in that Coleman wanted to assert his innocence. The state refused to accept his plea.

When the original trial judge, Judge Coate, urged the state to accept Coleman's plea, the prosecution forced him to recuse himself. It filed a peremptory challenge along with a signed affidavit for disqualification. Rosebud County Attorney Forsythe thus stated the prosecution's objection:

I feel that I am being forced by the Judge and by defense attorneys, they are attempting to force me to plea bargain when I have the constitutional authority and the sole constitutional authority to plea bargain on behalf of the State. I feel that in many respects decisions on motions are fixed in advance and I don't feel that I can have a fair trial, Judge.

Following Judge Coate's automatic disqualification, the case was assigned to Judge Martin. Upon taking the case, Judge Martin noted: "I understand, of course, that the State declined to even consider a conditional negotiated plea, is the right?" The prosecution immediately replied: "That is right."

During the pretrial hearings that took place on July 2 and 3, 1975, with Judge Martin presiding, the issue of plea bargaining arose again and was discussed extensively. First, the state objected to any discussion of plea bargaining, urging that the court limit the hearing to arguments on Coleman's motion to copy and inspect medical reports of Nank. "If we're going to hold a plea bargaining conference," Special Prosecutor Overfelt declared, "let's do that later, but let's not get these things

all mixed up in one big mish-mash." The court nevertheless allowed defense counsel to present his plea offer in open court.

Coleman's counsel, Monaghan, stated that his client was now willing to enter a plea of guilty to the charges of deliberate homicide and sexual assault without asserting his innocence. The judge then asked: "So your client now makes the same proposition to the State as Nank has?" Counsel answered in the affirmative and added that Coleman would waive his right against self-incrimination and testify against his codefendant, just as Nank had done. The judge made the following comment: "I think the State's in a tough position if they don't accept the plea".<sup>4</sup>

Again the state reacted by objecting generally to the court's participation in the plea bargaining. The presiding judge retorted: "I think counsel has the perfect right to come to the Court if they want to and talk about plea bargaining." Rosebud County Attorney Forsythe, on behalf of the state, then stated his objections to entering into any plea agreement with Coleman. He said that a plea would be vulnerable to attack for lack of voluntariness. Because of Coleman's repeated claims of racial discrimination, Forsythe opined, his plea would appear to

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<sup>4</sup> In fact, it appears that Coleman may have offered to plead to an even more serious charge than did Nank. In addition to pleading guilty to the charge of deliberate homicide, Coleman apparently offered to plead to sexual assault, while Nank pled to solicitation to commit sexual intercourse without consent. The parties and the court, however, treated the plea offers as being identical.

have been offered only because of his belief that he could not get a fair trial.

Forsythe added that the state also had problems with the plea because it lacked "a factual basis." He did not explain his statement further. After the judge responded by pointing out that due process does not invalidate a guilty plea that lacks a factual basis, Forsythe retreated to his lack-of-voluntariness argument, saying: "My immediate reaction to that, is that it doesn't make much of a difference. An essential part of the plea is, is it voluntary."

A little later, Special Prosecutor Overfelt expressed concern about the many objections that Coleman could raise after pleading guilty. The court responded: "That's the thing you're going to bring up and take care of when he enters his guilty plea. It establishes clearly that he can't bring these objections up again." Overfelt reacted to the judge's suggestion by complaining that the state could not decide on the plea offer on such short notice. The court then suggested that the state give the offer some thought. Overfelt refused.

In a further effort to overcome the state's resistance, defense counsel Monaghan told the court that his client would plead guilty, make a full disclosure, expressly waive his rights, and agree to be fully bound by his plea. Monaghan made the following observation: "the State has accepted a plea from Nank under tremendously difficult circumstances I think, and they're willing to say that's voluntarily (sic) and it will continue, but when I come in, they raise every objection there is . . . "



The court agreed with Monaghan's assessment and commented to the prosecution: "Of course I pointed out in a previous hearing that after you put on those 60 witnesses, and if the defendant takes the stand and says he made the same offer to the State as did Nank and they want to hang me and let Nank go, what is the jury going to do, and if the jury goes adverse, what is the appellant (sic) court going to do. That's the serious question that I tried to point out beforehand, and just so you can think it over and I want you to." Clearly, the point that the court tried to make to the prosecution on more than one occasion was that the state's behavior during plea bargaining gave the impression that the state was discriminating against Coleman.<sup>5</sup>

The next day - July 3, 1975 - defense counsel, in the presence of Coleman, restated the plea offer. Specifically, Monaghan stated: "I think to simplify the situation, I would say that we would make an offer to plead guilty under the same terms and conditions as has been accepted by the State with regard to Mr. Nank." After Coleman himself voiced his agreement to the offer, Monaghan declared that Coleman's plea was at least as reliable as Nank's, that it would include a complete disclosure of all the facts, and that it would provide the

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<sup>5</sup> In a prior hearing, the court had said with respect to Coleman's then potential equal protection claim:

If the jury is not receptive to that type of argument, I think the appellate court would give that argument very close attention under the statute that provides that a charge may be dismissed in the interest of justice. That is where that statute would apply.



state with some protection in case of a possible retraction by Nank later down the line:

I have stated before that I believe that Nank's plea is subject to as many technical or more technical problems than what I am trying to do on behalf of my client, and if they get a full voluntary complete disclosure of all the facts from Mr. Coleman which fully implicates Mr. Nank in every respect, as much as Mr. Nank has implicated Mr. Coleman, they then have what they want to protect themselves against an effort at some later date to where Mr. Nank could come in and assert that all of his plea and his bargaining was all under duress and that he didn't understand what he was doing, and so I think this is a benefit to the State that they will now have concrete testimony against Mr. Coleman and against Mr. Nank, in the event that anyone should take this up on appeal and the court should set aside what has been agreed and what has been set up, so it's not a one way street in that regard . . . .

The defense made every conceivable effort to assure the state of the validity of the plea:

[O]f course with all the questioning, whatever the State wants to know to assure itself that - you know, that nothing would be held back and I would try to reveal everything that I know as far as this case, to assist the State in making its inquiries and to assist the Court in making its inquiries if I didn't cover things well enough, and I would expect that the Court would do these things, to assure that there is no trick, no dodge or nothing on the part of the defendant to get of [sic] things at a later date, and that's our position.

Monaghan went further:

Your Honor, within my own capabilities I have tried to tell Mr. Coleman everything that he is waiving by doing this. And I say that if there is any question in

your mind, he's willing at this time to be sworn and to be questioned fully before anything ever goes further as to what he's waiving. I have tried to explain to him that he's waiving his rights against self incrimination, that he's waiving his right to confront the witnesses against him, that he's waiving his right to require the State to prove every fact beyond a reasonable doubt, that he's waiving his right to testify in his own defense. In other words, I have specifically as I possibly can, tried to explain to Mr. Coleman that when he comes in he has lost every right, and that he knows that his guilty plea may eventually result in a sentence by the Court of 140 years, and I don't know anything further, but when I say full disclosure of facts, a full questioning of the Court. It's not my decision to tell you that he understands everything that I have told him. If he is to get on the stand and everybody is to question him and then there is a record as to whether he understands, and I would not expect the Court or the prosecutors to accept the fact that I say that I have told him. I know that he would get up there and everybody would ask these questions.

Forsythe once again objected to plea bargaining in the presence of the court, citing the Standards of Ethics of the American Bar Association. Forsythe retreated from this position only after the court admonished him: "You just be careful on this young man. You're going to be held in contempt of this Court if you're accusing this Court. Now what the Court is trying to do is be fair and don't come in here and tell me that. Get that straight in your mind."

Forsythe then mentioned two other objections he had not advanced on the previous day or in any earlier plea bargaining discussions. First, he stated that he believed

that Coleman was the more culpable of the two men.<sup>6</sup> Second, he pointed out that Nank had begun to cooperate with the state earlier and had provided the state with evidence.

Perhaps perceiving the weakness of these new-found objections, Forsythe immediately retreated, once again, to reasserting his basic complaints about the unreliability of a guilty plea by Coleman. In utter frustration, if not amazement, the judge asked: "Why are you satisfied with Nank's then? You have done that with Nank, and now you won't be satisfied with exactly the same thing with Coleman?"

At this point, Forsythe made the following remarkable statement:

I think that the - what I'm trying to drive for here, is that one of these cases - at least one of these cases must be tried before a jury, with every witness being examined and cross examined and all of the evidence being considered in open court. To have both men go to prison on a guilty plea where their rights are formally read to them and they waive their rights without any real critical examination of the testimony, and the evidence, is what we feel is dangerous and we feel that it's particularly dangerous on the basis of the existing record.

(The prosecution ultimately appears to have carried this view to the extreme by concluding that since it was necessary for one of the defendants to be subjected to trial in order to create a record, once the record was

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<sup>6</sup> This rather casual suggestion did not constitute a significant part of the prosecution's argument and Forsythe offered no explanation or support for it.

created that defendant might just as well be executed.) The prosecution also said that Coleman might raise a claim of ineffective assistance of counsel at a later time.

Forsythe then complained that the record showed a motion for change of venue due to prejudice and that it might give the impression that the change in venue was not sufficient to remove the prejudice. The judge retorted that the court had already ruled on the issue and had made its order. He also made it clear to Forsythe that he thought that the argument was entirely improper.

Forsythe next protested that Coleman had undergone a sodium amytal test which purported to refresh his recollection and that the results of such a test were "highly questionable."<sup>7</sup> The judge rejected the prosecution's protestations, pointing out that Coleman would take the stand and that the prosecution could question him thoroughly in order to establish that the plea was being entered into knowingly, intelligently and voluntarily.

Forsythe simply replied that, in any case, the prosecution's "major objection" was that the record, read as a whole, might support an allegation by Coleman "[t]hat

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<sup>7</sup> The majority places great emphasis on the sodium amytal test and the fact that the defense counsel changed Coleman's plea to withdraw the assertion of innocence as a result of it, apparently for the purpose of establishing Coleman's guilt conclusively. See majority opinion, at 557-560. Yet as the prosecution pointed out, the result of such a test is "highly questionable." Cf. *Lindsey v. United States*, 236 F.2d 893 (9th Cir. 1956) (excluding from evidence a recording of and psychiatric testimony supporting an interview conducted under the influence of sodium pentahol [sic], a precursor of sodium amytal).

any plea taken from him would be coerced, and that he believed up until July 23rd [sic] that he was an innocent man and that's the only reason that he would plead to any charge, and that would be to avoid the death penalty." The judge responded that the Supreme Court in *North Carolina v. Alford*, 400 U.S. 25, 37 (1970), had said that under the due process clause a guilty plea could be accepted even if the defendant thought he was innocent and was pleading guilty only to avoid a more severe sentence. Finally, the judge wearied of attempting to reason with the prosecution, declaring: "There is no use in arguing this matter if you're not going to accept the offer. If you're not going to accept the offer, say so, and then that's the end of the matter." To which Forsythe replied: "We don't accept the offer, Your Honor."

#### D. Discussion

The most striking fact about the prosecution's adamant refusal even to consider any offer of a plea from Coleman is that - wholly aside from considerations relating to equal treatment and fairness - there were compelling tactical reasons for it to accept a plea. The case against Coleman was obviously one that would be extremely difficult to prove. Both trial court judges urged the prosecution to accept Coleman's plea, at least one after expressing serious doubts as to the strength of the prosecution's case and warning that Coleman might well be acquitted. The case against Coleman was entirely dependent on the testimony of codefendant Nank, a convicted felon, an admitted murderer, and a witness with the strongest possible motive to lie. (The weakness of the case is evidenced by the fact that two Montana Supreme



Court Justices ultimately concluded that Coleman's conviction should be reversed due to insufficiency of the evidence.) Ignoring the urging of the two trial judges, the prosecution declined to accept Coleman's plea, and instead decided to take the risk of going to trial. From the prosecutors' standpoint, the practical consequence of this decision was that on the one hand Coleman might escape punishment entirely and on the other the state might obtain a sentence of death that would be subject to serious constitutional challenge and might ultimately be set aside; whereas, accepting the plea would have assured the prosecution of a certain conviction and a sentence that would have resulted in Coleman's incarceration for life.<sup>8</sup>

Further, the prosecution's decision to gamble all in order to have a chance to seek the death penalty is particularly remarkable if one considers the extraordinary nature of capital punishment in Montana. Montana has not executed anyone in recent history. Bureau of

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<sup>8</sup> Nank was actually sentenced to 140 years in prison: 100 years for deliberate homicide and 40 for soliciting sexual intercourse without consent. Coleman could have been sentenced to at least as long a term of confinement had his plea been accepted. *See supra* note 4. Coleman ultimately received 140 years in prison on the noncapital charges, although the sentence was subsequently modified to 120 years following appeal.

In addition, as the defense attorney pointed out, Coleman's testimony would have provided the state with an important weapon against Nank, were Coleman's white codefendant to decide to retract his confession and plea at a later date.



Justice Statistics, *Capital Punishment* (1985). The last execution took place over forty years ago in 1943. U.S. Bureau of the Census, *Prisoners in State & Federal Prisons & Reformatories* (1943)(In that year, a black male between the ages of 20 and 24 was executed for the crime of murder.). The death penalty, thus, constitutes a most unusual type of punishment in that state.

The prosecution's conduct during the plea bargaining hearings strongly supports an inference of discrimination. Its explanations for its obduracy were wholly unpersuasive; the fact that the prosecution continually changed the justifications it gave for refusing to plea bargain suggests strongly that the explanations were pretextual. Throughout the proceedings, the prosecution seems to have been groping continually for new excuses or rationalizations and to have had no objective basis for its decision.

Turning to the specific explanations for its conduct advanced by the prosecution, the first was that Coleman's contemporaneous assertion of innocence would render the plea involuntary. However, as the initial judge pointed out early in the discussions, a declaration of innocence does not make a plea involuntary. The Supreme Court had previously validated guilty pleas even when the defendant refused to make an express admission of guilt. In *North Carolina v. Alford*, 400 U.S. 25, 37 (1970), the court explained:

while most pleas of guilty consist of both a waiver of trial and an express admission of guilt, the latter element is not a constitutional requisite to the imposition of criminal penalty. An individual accused of crime may voluntarily, knowingly, and understand-

ingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime.

The Court went further and stated that a guilty plea was valid even if the defendant insisted on asserting his innocence:

Nor can we perceive any material difference between a plea that refuses to admit commission of the criminal act and a plea containing a protestation of innocence when, as in the instant case, a defendant intelligently concludes that his interests require entry of a guilty plea and the record before the judge contains strong evidence of actual guilt.

*Id.* Montana's concerns about the voluntariness of the plea, therefore, had no legal merit. Nor, obviously, can the prosecution claim as an excuse, a mistake of law. As soon as the prosecution raised the issue, the trial judge advised it as to the applicable rule. Nevertheless, the prosecutors insisted on reasserting their erroneous theory.

Subsequently, after Coleman in an attempt to meet the prosecution's objections agreed not to insist on asserting his innocence, the prosecutors offered a string of inconsistent, unsupported, meritless reasons for not accepting his plea. The prosecution first claimed that Coleman's prior allegations of racial discrimination would render any plea made by him vulnerable to constitutional attack. In effect, then, the prosecution argued that having once suggested a possible claim of equal protection, Coleman had forfeited his right to equal treatment. The argument that a black who raises an issue of racial bias is thereafter disqualified from plea bargaining and accordingly must be subjected to trial on a capital charge (and then, apparently, executed if found guilty) is

perverse and dangerous as well as unconstitutional. In the end, the prosecution's argument attaches the ultimate penalty – death – to the legitimate assertion of a constitutional right. I find it difficult to believe that the prosecution could have advanced this argument in good faith. To the contrary, like several of its other arguments, this one appears to provide only the thinnest of disguises for its true underlying discriminatory motivation.

The prosecution next claimed that the plea could not be accepted because it lacked a factual basis. At this point in the proceeding, however, Coleman had agreed to admit his guilt and disclose on the record all the facts relating to the commission of the crimes. The prosecutor raised no specific questions as to the nature of the factual admissions that Coleman would make and offered no explanation as to why those admissions would not provide a factual basis for the plea. The simple fact is that Coleman's plea clearly did not present any factual basis problem. Furthermore, the judge pointed out to the prosecutors that they were once again advancing erroneous legal argument. He specifically reminded them that a factual basis is not required for a guilty plea.<sup>9</sup>

The prosecution then expressed concern about the many objections Coleman could raise after pleading guilty. The objections the prosecution referred to were "that he was under the influence of so many drugs at the time this was going on," that he was insane, or other

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<sup>9</sup> As we said in *Rodriguez v. Ricketts*, "the due process clause does not impose on a state court the duty to establish a factual basis for a guilty plea absent special circumstances." 777 F.2d 527, 528 (9th Cir. 1985) (citations omitted).

similar "stuff". However, as the trial judge patiently explained, Coleman could agree during the plea bargaining process not to raise any of these objections after the plea was accepted. In fact, Coleman did shortly thereafter expressly agree to waive all possible objections. Moreover, as the judge had also previously noted, the plea taken from Nank was subject to many of the same kind of objections and yet was readily accepted by the prosecution.

The prosecution then said, without further explanation, that Coleman was the more culpable of the two men. It had not previously advanced this contention and did not attempt to offer any support for it. (Nor does the state rely on this point in its brief before us.) Instead, without waiting for the judge to respond, the prosecution quickly returned to what it called its "major objection" – voluntariness – but not before also arguing that Nank had begun to cooperate with the state earlier in the case and had provided inculpatory evidence. Unfortunately, the prosecutor failed to advise the court (by this time, the second judge) that Coleman had offered to plea guilty to the same charges as Nank less than two weeks after Nank's plea. Neither the court nor the prosecutors treated these two objections seriously or even adverted to either of them again. Rather, the prosecution concentrated almost entirely on its voluntariness objection. This objection appeared in many forms and guises throughout the plea bargaining discussions and served as the predominant and underlying theme of all the exchanges among the court and the parties.

The prosecution also offered two rather odd theories – one voluntariness-related, one not. The prosecution

argued that Coleman had previously filed a motion for change of venue due to prejudice and that the record might give the impression that the change in venue might not have been sufficient to remove the prejudice. As is obvious, the change of venue issue provides a far greater risk to the prosecution on an appeal from a conviction after trial than on an appeal from a guilty plea. Equally odd, the prosecutors contended that it would be too risky to accept Coleman's guilty plea because a question had previously been raised as to the competence of Coleman's counsel. The prosecutor failed to explain why it would be more risky to have Coleman represented by incompetent counsel at a successful noncapital plea bargaining session than at a capital punishment trial and capital sentencing proceeding that might result in an order for Coleman's execution.

Zealously pursuing its voluntariness theme, the prosecution also purported to fear that Coleman might claim that his plea was a result of his having submitted to a sodium amytal test – a test the prosecution claimed was unreliable. Aside from the fact that Coleman could have waived that objection, and that shortly thereafter he agreed to take the stand and do so, this objection was, like so many others, patently frivolous. Coleman had been attempting vigorously to plead guilty for some time prior to the date on which he took the sodium amytal test. Thus, the decision to plead guilty could not possibly have been a product of that test. At most, the test could have affected Coleman's willingness to acknowledge his guilt, not his willingness to plead, and acknowledgment of guilt is, as discussed above, not a necessary condition to a valid plea.



After the judge explained why the sodium-amytal-test objection lacked merit, the prosecution retreated to what it called its "major objection" – another version of its voluntariness argument. Rosebud County Attorney Forsythe explained that the record, read as a whole, might support an allegation by Coleman "[t]hat any plea taken from him would be coerced, and that he believed up until July 3rd that he was an innocent man and that's the only reason that he would plead to any charge, and that would be to avoid the death penalty." The judge correctly pointed out to the prosecution that the fact that a defendant pleads guilty in order to avoid a capital sentence does not taint the plea. At the time of the prosecutor's objection it was well established that even if the accused offers the plea only to avoid capital punishment, the plea may nevertheless be voluntary. Several years earlier, the Supreme Court had held that "a plea of guilty is not invalid merely because entered to avoid the possibility of the death penalty." *Brady v. United States*, 397 U.S. 742, 755 (1970). The prosecutor's "major objection", consequently, had no legal merit and the trial judge so advised him.

Essentially, the prosecutor's explanations for its refusal to plea bargain with Coleman consisted of expressions of concern that any plea might be subject to subsequent legal attack, a concern that was clearly unmeritorious. The two trial judges involved in this case so advised the prosecution and both urged acceptance of Coleman's plea.

Under these circumstances, the prosecution's motivations are, at the very least, highly suspect. A black defendant received life or death treatment unequal to that



received by his similarly situated white codefendant. The prosecution offered frivolous and inconsistent explanations for that difference in treatment. When the trial judge would patiently point out legal errors in their explanations, the prosecutors would switch grounds and try to put an end to the plea bargaining. The prosecutors were consistent in only one respect. They were unyielding in their determination to try the black defendant on capital charges and then seek his execution. In my opinion, these facts, standing alone, give rise to an extremely strong inference of discriminatory motivation.<sup>10</sup>

There are other circumstances, as well, that strongly support the conclusion that the prosecution was influenced by factors relating to Coleman's race. There can be little doubt that from the very outset of the proceedings through the imposition of the second death sentence, the prosecutors' conduct was overzealous by any standards. Rather than listing various examples, it should suffice to note the facts regarding the decision to seek the death sentence the second time. The prosecutors decided to try to apply the 1977 death penalty statute to Coleman, although the Montana Supreme Court, in *Coleman I*, had indicated strongly that it did not expect Coleman to be resentenced to death. 177 Mont. at 23 & 33, 579 P.2d at 746 & 751. See generally, *Coleman II*, 185 Mont. 299, 337-40, 605 P.2d 1000, 1022-23 (1979)(Shea, J., dissenting), cert. denied,

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<sup>10</sup> In its opinion, the majority simply lists some of the explanations offered by the prosecution and then states that "[t]he record reveals no evidence of racial prejudice . . ." Maj. op. at 582. Despite the patent lack of merit in the prosecution's explanations, the majority does not even bother to comment on them.

446 U.S. 970 (1980). (This fact is not changed by that court's subsequent upholding of the prosecution's actions. *Coleman II*, 185 Mont. at 313-324, 605 P.2d at 1010-1015.) The prosecution invoked the 1977 death penalty statute even though Coleman had been tried, convicted, and originally sentenced prior to its enactment and no court had ever approved an order of execution under those circumstances. See section IV.A.3. In seeking Coleman's execution, the prosecution clearly sought to stretch the law to, if not beyond, every conceivable limit.<sup>11</sup>

Any examination of the prosecutor's motivations must include a recognition of the fact that Coleman's case involved a violent sexual crime allegedly committed by a black defendant against a white female victim. The crime took place and was tried in a part of the country where the proportion of black individuals in the community is

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<sup>11</sup> The 1977 death penalty statute was enacted not only after the crime was committed but, in addition, after Coleman was tried and sentenced. As far as I am aware, the statute has not been applied under similar circumstances to anyone else in the State of Montana, and all the other states that have faced the issue have declined to apply a new death penalty statute to an individual who was tried and sentenced under a prior unconstitutional statute. (See *infra* section IV.A.3, for full discussion of why retroactive imposition of the death penalty in this case violates the due process clause.) The record shows that the prosecution was at all times well aware of the *ex post facto* and due process problems that such retroactive application gives rise to.

extremely small.<sup>12</sup> Little knowledge regarding the practical operations of our prosecutors' offices is required in order to understand that concern over community sentiments may well have influenced the prosecutors' decision to treat Coleman differently than Nank. As the trial judge said to the prosecutor during one of the discussions over Coleman's attempt to plead to identical charges, "I think we are losing perspective because of your zeal, inexperience and probably because of the public pressure in the background."

The fact that Coleman's own attorney and the trial judge referred to the then 28 year old Coleman as "this black boy" shows how pervasive was the feeling in the community that Coleman was different in kind from his white codefendant. Coleman's attorney was apparently the first to use the term "this black boy"; he did so during cross-examination of a witness. The court, in turn, referred to Coleman as "this black boy" in chambers, in ruling on a motion for dismissal or judgment of acquittal at the close of the government's case.<sup>13</sup>

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<sup>12</sup> The percentage of black people in the total population of the State of Montana has never exceeded 0.5%. See Bureau of the Census, *State and Metropolitan Area Data Book 6* (1979); Bureau of the Census, *State and Metropolitan Area Data Book 509* (1986).

<sup>13</sup> After noting that the motion was "a real serious motion" that had "some merit", the judge made the following comment about the government's case: "Well, all you've shown is the opportunity for this black boy to do it. You've shown plenty of opportunity."

Respondent suggests that we take the court's reference to Coleman as "charitable." Respondent's suggestion is offensive and the majority properly refuses to accept it. But after disagreeing with respondent's characterization of the court's use of the phrase, the majority goes on to say that "when placed in context and viewed in light of the entire trial transcript, [the reference] does not establish Coleman's claim of racial discrimination." Maj. op. at 583-584.

I agree with my colleagues that the remark does not "establish" the claim of racial discrimination; no one ever suggested that, standing alone, it did. However, the two references assist a court in making the requisite "sensitive inquiry", *Arlington Heights*, 429 U.S. at 267, as to why Coleman was not treated in the same manner as his white codefendant. The simple answer is that he was generally regarded in the community, and in the legal system, as a "black boy".

Finally, Coleman's claim of discrimination must be viewed in the context of our nation's long history of racial discrimination in capital cases. In deciding when the death penalty should be imposed, our legal system has historically shown less concern for black defendants (and black victims) than for their white counterparts. As Professors Samuel R. Gross and Robert Mauro have concluded, "there is a considerable body of published research on racial patterns in capital punishment, and most of it indicates that racial factors have been influential in determining who has been sentenced to die and who has been executed." Gross and Mauro, *Patterns of*

*Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 Stan. L. Rev. 27, 45 (1984).<sup>14</sup>

In *McCleskey*, the Court held that statistics alone are insufficient to warrant invalidation of a state's capital punishment laws. In so concluding, however, the Court did not say that statistics are wholly irrelevant in deciding individual capital punishment cases; nor did it say that we must shut our eyes to history and current reality alike when we evaluate the motives underlying a prosecutor's decision to seek the death penalty in a specific case. Decisions are made in the context of societal attitudes, and we must recognize the existence of those attitudes when we look to reasons underlying individual judgments. This is not to say that we must commence each capital punishment case with the assumption that a black defendant was singled out for the death penalty because of his race. But where, as here, the record reveals

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<sup>14</sup> In his dissent in *Pulley v. Harris*, 465 U.S. 37 (1984), Justice Brennan stated: "Although research methods and techniques often differ, the conclusions being reached are relatively clear: Factors crucial, yet without doubt impermissibly applied, to the imposition of the death penalty are the race of the defendant and the race of the victim." *Id.* at 67 (Brennan, J., dissenting). See also *Furman v. Georgia*, 408 U.S. 238, 255 (1972) (Douglas, J., concurring) ("we know that the discretion of judges and juries in imposing the death penalty enables the penalty to be selectively applied, feeding prejudices against the accused . . . if he is a member of a suspect or unpopular minority. . . ."); *id.* at 364 (Marshall, J., concurring) ("Studies indicate that while the higher rate of execution among Negroes is particularly due to a higher rate of crime, there is evidence of discrimination."). See also Baldus study, discussed in *McCleskey v. Kemp*, 107 S. Ct. 1756 (1987).



a dramatic difference in the treatment of white and black codefendants, where the prosecution's explanations for that difference are highly suspect if not patently pretextual, and where the prosecution has stretched the law to, if not beyond, its limits in order to seek capital punishment for the black and not the white, we are obliged to remedy the impermissible effect that racial prejudice had upon Montana's decision to seek the death penalty and to refuse acceptance of Coleman's plea.

*E. Evidentiary Hearing on the Equal Protection Claim*

Were I required, on the basis of the record before us, to decide the issue whether the state acted in a discriminatory manner in rejecting Coleman's plea and imposing the death penalty, I would have no hesitation in saying that it did. However, we need not reach that ultimate question here. Coleman was entitled, at the least, to a full and fair hearing on the issue in the district court. Yet, no hearing was held and his petition was rejected summarily.

When, at the time of his first appeal, Coleman urged that racial bias was the cause of the prosecution's refusal to accept his guilty plea, the Montana Supreme Court, as explained *supra* at note 2, erroneously held that the prosecution had absolute discretion to reject Coleman's plea regardless of any racially-biased motivation for its decision. *Coleman I*, 177 Mont. at 21, 579 P.2d at 744-45. Accordingly, the court failed to make any factual determination regarding the prosecutors' alleged discriminatory motivation. Thus, we have no state court factual finding that we presume to be correct under 28 U.S.C. § 2254 (1982).



Coleman raised the issue again in his *habeas* petition. The district court granted summary judgment for the state, making the following conclusory statement regarding the equal protection claim: "[Coleman's] claim that he was treated differently because he is black is nothing more than idle speculation unsubstantiated by any facts." The court, however, failed to discuss, and appears to have been wholly unaware of, the single most important fact in the case: i.e., that Coleman made a plea offer that was identical to the one the prosecution had accepted from his similarly situated white codefendant. Inexplicably, the district court focused exclusively on the initial plea offer made by Coleman—at a time when he was still insisting on asserting his innocence. It did not even mention the critical July 2 and July 3 hearings. As a result, it mistakenly concluded that Coleman and Nank did not make the same plea offer.<sup>15</sup> As a result of this crucial error, the

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<sup>15</sup> The district court's full discussion of this issue was as follows:

Petitioner claims that, because he is black, he was denied the same plea bargaining opportunity as that afforded his white codefendant. Petitioner argues that the only difference between him and Nank was the color of their skin. Such is not the case. Nank confessed to the crime shortly after his arrest and cooperated with law enforcement authorities. Petitioner maintained his innocence.

A defendant may plead guilty while maintaining his innocence, especially to avoid a death sentence. *North Carolina v. Alford*, 400 U.S. 25 (1970). However, neither the trial court nor the prosecution are required to accept a guilty plea under such circumstances. The acceptance of a guilty plea is within the

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district court failed entirely to discuss the attempts by Coleman to plead on the same terms as Nank. Apparently because of its ignorance of the actual nature of Coleman's plea offer, the court summarily rejected his equal protection claim without the benefit of a factual hearing.

I am aware that, in deciding that a general claim of unequal treatment based solely on statistical evidence was inadequate to raise an inference of discrimination, the Court recently stated that, "the policy considerations behind a prosecutor's traditionally 'wide discretion' suggest the impropriety of . . . requiring prosecutors to defend their decisions to seek death penalties, 'often years after they were made.'" *McCleskey v. Kemp*, 107 S.Ct. at 1768 (citing *Wayte v. United States*, 470 U.S. at 607, and quoting *Imbler v. Pachtman*, 424 U.S. 409, 425-26 (1976)) (footnotes omitted). When viewed as a statement of general principle, the Court's comment is certainly unassailable. Significantly, however, the Court quickly sought to put its statement into its proper perspective and thus to forestall sweeping or overbroad constructions of its opinion. Speaking for the Court, Justice Powell explained that the justices did not intend to preclude questioning of prosecutors where the facts of the specific case warranted an inference of unconstitutional conduct. He said that the Court's "longstanding precedents . . . hold that a prosecutor need not explain his decisions *unless the criminal defendant presents a prima facie*

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discretion of the court. The petitioner's claim that he was treated differently because he is black is nothing more than idle speculation unsubstantiated by any facts.

case of unconstitutional conduct with respect to his case." Id. at 1769 n.18 (citing *Batson* and *Wayte*) (emphasis supplied).

Under *McCleskey*, while we must be careful to refrain from forcing the prosecution to explain its every decision to seek the death penalty, we must be willing to do so when the factual circumstances in the individual case show that racial discrimination may have constituted a motivating factor. In short, where the defendant establishes a prima facie case of racial discrimination, we have an obligation to conduct a hearing and probe the motives of the prosecution. In such a case, "the trial court must undertake a 'factual inquiry' that 'takes into account all possible explanatory factors' in the particular case." *Batson v. Kentucky*, 106 S. Ct. at 1722 (quoting *Alexander v. Louisiana*, 405 U.S. 625, 630 (1972)).

Here, at the very least, a strong inference of discrimination exists. Accordingly, rather than dismissing Coleman's petition summarily, the district court should have conducted an evidentiary hearing to probe into the motives of the prosecution in refusing to consider his plea offer. Cf. *Batson v. Kentucky*, 106 S. Ct. at 1725.

#### F. Conclusion

We have been told by the Supreme Court that we must undertake a "sensitive inquiry" in cases such as this, and that we must be closely attuned to the abiding evils of racial discrimination. Sensitivity to racial discrimination requires a recognition of the subtlety of its forms and manifestations. Today, unlike in the first half of this century, racial discrimination most frequently manifests itself in covert rather than overt forms. No longer do

prosecutors or judges proudly proclaim their biases openly on the record. No longer does society as a whole encourage, or even tolerate, official discrimination against blacks. Nevertheless, no-one [sic] would seriously suggest that racial discrimination has been eradicated from our society. Discrimination still exists but it has become more difficult to recognize. Proof no longer comes wrapped in nice little packages with red ribbons and tinkling bells. Sensitivity, as the Court has told us, is the key to understanding the nature and existence of discrimination today. Once a sensitive inquiry is undertaken and one looks beyond the literal language of the written record and examines with some understanding and awareness all the facts and circumstances surrounding the case of this 28 year-old "black boy", it is clear that race played a significant part in the state's decision to execute Dewey Coleman.

Nevertheless, the majority here affirms the district court's summary judgment order. It says only that it sees "no evidence of racial prejudice." Maj. op. at 582. As a result, difficult as it may be to understand, no court – state or federal – has ever made a factual inquiry into Coleman's equal protection claim. The majority is willing to resolve his life or death discrimination claim simply by accepting blindly the state's pretextual explanations of its motives. It sees no need for any court to make "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. at 266. Sadly, the majority has chosen to ignore not only the Supreme Court's warnings regarding our duties in relation to racial discrimination cases but also its directive that in

capital cases, "the severity of the sentence mandates careful scrutiny in the review of any colorable claim of error." *Zant v. Stephens*, 462 U.S. 862, 885 (1983).

Notwithstanding my two colleagues' votes to permit Coleman's execution, it is inconceivable to me that he will be allowed to die without a federal court either simply vacating his death sentence or ordering a hearing on his claim that race was a motivating factor underlying the state's decision to execute him. I strongly believe that we have passed the point in our history where the courts of the United States will permit a black person to be executed in such flagrant disregard of the principles of equal treatment under law.

### III. THE CAPITAL SENTENCING PROCEEDINGS

The inadequacies of the sentencing proceeding in which Coleman was ordered hanged require a reversal of his death penalty. Coleman was deprived of his right to present oral argument on the nature of the mitigating circumstances and on the question whether those circumstances were sufficient to overcome the statutory aggravating circumstances. In short, he was not allowed to present his arguments on the ultimate question whether capital punishment was the appropriate penalty in his case. Conversely, the sentencing court did not comply with its constitutional duty to listen to the defendant at the time of sentencing. Moreover, the record reveals that the judge failed entirely to recognize or consider all but one of the mitigating facts and circumstances the Constitution requires the sentencer to take into account. Further, he improperly based his decision in part on an



unadjudicated offense. For these reasons, the sentence cannot stand.<sup>16</sup>

### A. Introduction

The Supreme Court has emphasized the importance of the proceeding that leads to the imposition of the death penalty. A capital punishment hearing differs substantially from other sentencing proceedings. The difference, the Court has explained,

rests squarely on the predicate that the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two.

*Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality). See also *Sumner v. Shuman*, 207 S. Ct. 2716, 2720 (1987); *Turner v. Murray*, 106 S. Ct. 1683, 1688 (1986) (plurality); *California v. Ramos*, 463 U.S. 992, 998-99 (1983); *Zant v. Stephens*, 462 U.S. 862, 884-85 (1983); *Lockett v. Ohio*, 438 U.S. 586, 602-04 (1978) (plurality); *Gardner v. Florida*, 430 U.S. 349, 358-59 (1977) (plurality); *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (plurality); *Furman v.*

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<sup>16</sup> In *Skipper v. South Carolina*, 106 S. Ct. 1669 (1986), the Supreme Court decided that the state trial court had failed to consider relevant mitigating evidence and, therefore, reversed the death penalty. The Court, nonetheless, left open the possibility of resentencing. It stated: "The resulting death sentence cannot stand, although the State is of course not precluded from again seeking to impose the death sentence, provided that it does so through a new sentencing hearing at which petitioner is permitted to present any and all relevant mitigating evidence that is available." *Id.* at 1673 (citing *Eddings v. Oklahoma*, 455 U.S. 104, 117 (1982)). See also *Hitchcock v. Dugger*, 107 S. Ct. 1821, 1824 (1987).



*Georgia*, 408 U.S. 238, 286-291 (1972) (Brennan, J., concurring); *id.* at 306 (Stewart, J., concurring). The sentencer must allow defense counsel to present oral argument on the mitigating and aggravating circumstance and on whether the death penalty should be imposed. The sentencer must then "listen" to the argument and decide whether to impose a capital sentence after giving careful consideration to the mitigating and aggravating circumstances in the case. *Eddings v. Oklahoma*, 455 U.S. at 115 n.10 (citing *Lockett v. Ohio*, 438 U.S. 586).

It is of "vital importance to the defendant and to the Community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." *Gardner v. Florida*, 430 U.S. at 359. Accordingly, more than in any other punishment proceeding, in capital cases the judicial system must take extraordinary precautions to assure that the punishment is based on the particularities of the offense committed and the individual circumstances of the offender.<sup>17</sup> In fact, the Montana Supreme Court vacated Coleman's first death penalty because the statute pursuant to which it was imposed failed to comport with the constitutional imperatives of *Woodson*, as well as those of *Coker v. Georgia*, 433 U.S. 584 (1977) and *Roberts (Harry) v. Louisiana*, 431 U.S. 633 (1977) (per curiam). *Coleman I*, 177 Mont. 1,

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<sup>17</sup> *Sumner v. Shuman*, 107 S. Ct. 2716; *Hitchcock v. Dugger*, 107 S. Ct. at 1824; *Eddings v. Oklahoma*, 455 U.S. at 115; *Lockett v. Ohio*, 438 U.S. at 603 (plurality); *Roberts (Harry) v. Louisiana*, 431 U.S. at 636 (per curiam); *Woodson v. North Carolina*, 428 U.S. at 304 (plurality); *Gregg v. Georgia*, 428 U.S. at 197; *Proffitt v. Florida*, 428 U.S. at 252-53; *Jurek v. Texas*, 428 U.S. at 271-72; *Roberts (Stanislaus) v. Louisiana*, 408 U.S. at 334-35.

15-16, 579 P.2d 732, 741-42 (1978). The Montana statute under which Coleman was first sentenced provided for automatic imposition of the death penalty and did not require consideration of the particularities of the case and of the accused prior to the imposition of capital punishment. The second sentence must be set aside because of equally serious constitutional violations.

### B. Facts

#### 1. Coleman's First Sentencing

The statute under which Montana sentenced Coleman the first time originally provided that "[a] court shall impose the sentence of death following conviction of aggravated kidnapping if it finds the victim is dead as a result of the criminal conduct unless there are mitigating circumstances." Rev. Code Mont. § 95-5-304 (1947). Apparently in response to the Supreme Court's condemnation of unbridled discretion in the imposition of capital punishment,<sup>18</sup> the Montana legislature in 1974 amended

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<sup>18</sup> In *Furman v. Georgia*, the Supreme Court invalidated death penalty statutes from Georgia and Texas for constituting "cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." 408 U.S. 238, 240 (1972)(per curiam). Five justices filed separate opinions in support of the judgment. Two justices decided that capital punishment *per se* constituted cruel and unusual punishment. *Id.* at 257-306 (Brennan, J., concurring); *id.* at 314-74 (Marshall, J. concurring). The three other justices in the majority, however, decided the case exclusively on the basis of the limitations that the fourteenth and eighth amendments impose on the application of the death penalty. *Id.* at 256 (Douglas, J., concurring) (The eighth amendment mandates "legislatures to write penal laws that are evenhanded, nonselective, and nonarbitrary, and to

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this section by striking the phrase "unless there are mitigating circumstances." The legislature thus made the death penalty mandatory. "Under this statute, if the court finds . . . that the victim of an aggravated kidnapping died as a result of the crime, the convicted defendant must be sentenced to die." *Coleman I*, 177 Mont. at 16, 579 P.2d at 742. In 1975, the trial court sentenced Coleman pursuant to the 1974 mandatory death penalty scheme. In *Coleman I*, the Montana Supreme Court held that statute unconstitutional because of the absence of a "provision for the trial court to consider any mitigating circumstances" and ordered that a new and lawful sentence be imposed. *Id.*

## 2. The 1977 Death Penalty Statute

In 1977, the Montana legislature repealed the unconstitutional death penalty statute under which Coleman had been originally tried and sentenced - 1977 Mont.

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require judges to see to it that general laws are not applied sparsely, selectively, and spottily to unpopular groups."); *id.* at 310 (Stewart, J., concurring) ("[T]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed."); *id.* at 313 (White, J., concurring) (The statutes constitute cruel and unusual punishment because "as [such statutes are] administered, the penalty is so infrequently imposed that the threat of execution is too attenuated to be of substantial service to criminal justice."). Following *Furman*, Montana, along with "a number of other States," *Woodson v. North Carolina*, 428 U.S. at 298 (plurality), passed mandatory death penalty statutes apparently in an attempt to deal with the problem of unbridled discretion in capital punishment.

Laws § 16, ch. 338 – and enacted a new death penalty statute codified at the time as Rev. Code Mont. §§ 95-2206.6 to 95-2206.15 (1977) and currently codified as Mont. Code Ann. §§ 46-18-301 to 46-18-310 (1985).<sup>19</sup> Section 95-2206.6 provides that the sentencing judge must conduct a hearing to determine if any statutory aggravating circumstances exist under section 95-2206.8 and if any statutory mitigating circumstances exist under section 95-2206.9. Mont. Code Ann. §§ 46-18-301, 46-18-303 & 46-18-304 (1985). The statute clearly contemplates a full fact-finding hearing. Mont. Code Ann. § 46-18-302 (1985).<sup>20</sup> In addition, it requires that both the state and the defendant “be permitted to present argument for or against sentence of death.” *Id.*

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<sup>19</sup> In 1978, the Revised Code of Montana was amended and completely reorganized as the Montana Code Annotated. The two codifications, however, are identical for the purposes of this opinion.

<sup>20</sup> This section provides:

*Evidence that may be received.* In the sentencing hearing, evidence may be presented as to any matter the court considers relevant to the sentence, including but not limited to the nature and circumstances of the crime, the defendant's character, background, history, and mental and physical condition, and any other facts in aggravation or mitigation of the penalty. Any evidence the court considers to have probative force may be received regardless of its admissibility under the rules governing admission of evidence at criminal trials. Evidence admitted at the trial relating to such aggravating or mitigating circumstances shall be considered without reintroducing it at the sentencing proceeding. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

Mont. Code Ann. § 46-18-302 (1985).

The Montana legislature enacted the 1977 statute in an attempt to meet the constitutional requirement that the trial court give careful consideration to "the character and record of the individual offender and the circumstances of the particular offense." *Woodson v. North Carolina*, 428 U.S. at 304. The legislature provided for a flexible and open-ended hearing which would enable the trial court to give both the offender and the offense the thorough individual consideration that the Constitution requires.

Section 95-2206.8 sets forth the aggravating circumstances. Mont. Code Ann. § 46-18-303 (1985).<sup>21</sup> The statu-

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<sup>21</sup> *Aggravating circumstances.* Aggravating circumstances are any of the following:

(1) The offense was deliberate homicide and was committed by a person serving a sentence of imprisonment in the state prison.

(2) The offense was deliberate homicide and was committed by a defendant who had been previously convicted of another deliberate homicide.

(3) The offense was deliberate homicide and was committed by means of torture.

(4) The offense was deliberate homicide and was committed by a person lying in wait or ambush.

(5) The offense was deliberate homicide and was committed as a part of a scheme or operation which, if completed, would result in the death of more than one person.

(6) The offense was deliberate homicide as defined in subsection (1)(a) of 45-5-102 [formerly 94-5-192] and the victim was a peace officer killed while performing his duty.

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tory aggravating circumstance relevant to this case appears in subsection (7): "The offense was aggravated kidnapping which resulted in the death of the victim." Section 95-2206.9 defines the mitigating circumstances. Mont. Code Ann. § 46-18-304 (1985).<sup>22</sup> Among the mitigating circumstances the statute lists is the one set forth in subsection (1), that "[t]he defendant has no significant history of prior criminal activity." In addition, subsection

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(7) The offense was aggravated kidnapping which resulted in the death of the victim.

(8) The offense was attempted deliberate homicide, aggravated assault, or aggravated kidnapping committed while incarcerated at the state prison by a person who has been previously:

(a) convicted of the offense of deliberate homicide; or

(b) found to be a persistent felony offender pursuant to part 5 of this chapter and one of the convictions was for an offense against the person in violation of Title 45, chapter 5, for which the minimum prison term is not less than 2 years.

Mont. Code Ann. § 46-18-303 (1985). Subsection (8) was not part of the statute when it was originally enacted in 1977.

<sup>22</sup> *Mitigating circumstances.* Mitigating circumstances are any of the following:

(1) The defendant has no significant history of prior criminal activity.

(2) The offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

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(8) of the statute includes a catchall provision: "Any other factor that exists in mitigation of the penalty."

Section 95-2206.10 specifies the effect to be given aggravating and mitigating circumstances when the trial court decides whether to order the execution of a convicted defendant. Mont. Code Ann. § 46-18-305 (1985).<sup>23</sup>

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(3) The defendant acted under extreme duress or under the substantial domination of another person.

(4) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(5) The victim was a participant in the defendant's conduct or consented to the act.

(6) The defendant was an accomplice in an offense committed by another person, and his participation was relatively minor.

(7) The defendant, at the time of the commission of the crime, was less than 18 years of age.

(8) Any other fact that exists in mitigation of the penalty.

Mont. Code Ann. § 46-18-304 (1985).

<sup>23</sup> *Effect of aggravating and mitigating circumstances.* In determining whether to impose a sentence of death or imprisonment, the court shall take into account the aggravating and mitigating circumstances enumerated in 46-18-303 [formerly 95-2206.8] and 46-18-304 [formerly 95-2206.9] and shall impose a sentence of death if it finds one or more of the aggravating circumstances and finds that there are no mitigating circumstances sufficiently substantial to call for leniency. If the court does not impose a sentence of death and one of the

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According to this section, where at least one aggravating circumstance exists, the court must impose the death penalty unless there are mitigating circumstances that are sufficiently substantial to warrant leniency.

The statutory scheme thus requires that the trial court considering capital punishment first establish the existence of at least one of the listed aggravating circumstances. The court then must consider any of the specifically-enumerated mitigating circumstances as well as any other fact that might exist in mitigation of the penalty. Having found at least one aggravating circumstance and having tabulated all the facts or circumstances in mitigation, the trial court must then decide whether the mitigating circumstances are "sufficiently substantial to call for leniency." *Id.* If they are not, the trial court must order the execution of the accused. Otherwise, the trial court may impose a sentence of imprisonment for life or for any term authorized by law.

In section 95-2206.11, the legislature requires explicit, written findings of fact as to the existence or nonexistence of aggravating and mitigating circumstances. Mont. Code Ann. § 46-18-306 (1985).<sup>24</sup> The statute thus requires the

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aggravating circumstances listed in 46-18-303 [formerly 95-2206.8] exists, the court may impose a sentence of imprisonment for life or for any term authorized by the statute defining the offense.

Mont. Code Ann. § 46-18-305 (1985).

<sup>24</sup> *Specific written findings of fact.* In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings

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trial court to specify, in writing, the grounds underlying its decision to impose the death penalty.

Finally, incorporating another constitutional requirement, the statute provides in section 95-2206.7 that before any sentence is imposed: "The state and the defendant shall be permitted to present argument for or against sentence of death." Mont. Code Ann. § 46-18-302 (1985).

### 3. *The Resentencing of Coleman*

After the Montana Supreme Court reversed as unconstitutional Coleman's first death penalty, the prosecution decided to invoke the newly enacted 1977 death penalty statute in order once again to seek Coleman's execution. The first proceeding under the new statute took place on June 14, 1978. The trial court set the hearing to consider "the matter of mitigation of punishment." The court expressly reserved the sentencing to a subsequent date.

The judge asked Coleman's counsel whether he agreed with proceeding "with the hearing at this time on the matter of mitigation." Coleman's attorney responded in the negative and made an extensive statement in which he argued that the hearing should focus instead on whether the court should lawfully apply the 1977 death penalty statute retroactively to his client. He had previously filed a motion to quash and had submitted a brief

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of fact as to the existence or nonexistence of each of the circumstances set forth in 46-18-303 [formerly 95-2206.8] and 46-18-304 [formerly 95-2206.9]. The written findings of fact shall be substantiated by the records of the trial and the sentencing proceeding.

Mont. Code Ann. § 46-18-306 (1985).

on the issue. Unquestionably, the issue was a substantial one – see *infra* section IV.A.3 – and its outcome would determine whether a mitigation hearing was even necessary. Coleman's attorney recommended that, as the next step, the court permit the prosecution to respond to his brief. The court, he added, should thereafter give the defense five days to reply to the prosecution's response and then decide the retroactivity issue.

Counsel for Coleman then suggested that if the issue of mitigation became material (i.e., if an adverse ruling were issued on the retroactivity question) it be taken up at a later date – at the time of sentencing. Counsel said that the sentencing proceeding could be conducted simply on the basis of the presentence investigation report and oral arguments to be made at that time by both parties. He said:

we have to present here at this time, no mitigating factors at all. It would be a matter of simply argument. There is a presentence investigation report. . . . I take the view that unless Mr. Forsythe [the prosecutor] wishes to present witnesses, that at the time of sentencing is just simply a statement by Mr. Forsythe pointing out what he thinks relevant, and a statement pointing out what I think is relevant.

Thus, Coleman's attorney advised the court that, unless the prosecutor wished to call witnesses, no factual hearing would be necessary and that oral arguments as to the sentence to be imposed would be presented at the time of sentencing.

Neither the court nor the prosecution objected to counsel's statements. The judge simply said "All right" and asked the prosecutor whether he had anything to say.

The prosecutor addressed the issue of retroactivity, arguing that the 1977 death penalty statute could be applied retroactively to Coleman. The court then told Coleman's attorney:

the Court has two matters to sentence on [the capital offense and the related noncapital crime], and there is always a possibility that after the Court has considered your brief, it might rule favorably on your motion, and in that event there would be no necessity for the Court to make any finding or anything else under the—under the existing statute.

The court appeared to be saying that if it decided the retroactivity issue favorably to defendant, there would be no need for further proceedings on the death penalty question but that if it decided the issue against Coleman, further proceedings on that matter would be in order.

The trial court then noted the defense's statement that it did not intend to present any evidence on the mitigating circumstances. It also called for a responsive brief from the prosecutor on the *ex post facto* issue. The trial court next filed the presentence report and made Thomas Lofland, the reporting officer, available for interrogation. Both parties declined to question Lofland. In regard to the presentence report, the trial court noted: "The significant part of it relative to mitigating circumstances, is that the defendant has never been convicted of any felony prior to this charge."

The court again noted that the defense did not intend to "call any witnesses to establish any mitigating circumstances" and asked the prosecutor whether he wished "to



make any statement relative to aggravating circumstances." At that point, the prosecution tried unsuccessfully to call Coleman to the stand but the court declined to compel him to testify.

The court then said: "the Court will render its findings of fact and will go up on the record that is present in the absence of any mitigating circumstances presented by the defendant at this hearing," and gave the prosecution ten days to file its brief on the question of the retroactivity of the 1977 death penalty statute. The prosecution told the court that it wished to identify specific pages in the trial transcript that had "a bearing . . . on the sentencing" and started to do so orally. The judge, at the defense's request, advised the prosecution he would prefer it to identify the relevant pages in writing and that it could do so in the previously ordered responsive brief, although it had the option to continue with its oral recitation of page numbers as well. The prosecutor said, "Okay"—and terminated his oral recitation. The court then told the defense attorney that he would have five days to respond to the prosecution's brief and adjourned the hearing. He also told the parties, "Both parties of course understand that you may also present any proposed findings if you wish to do so."

By the end of the hearing, both the court and the parties seem to have agreed that the defense would present to witnesses on the issue of mitigation and would rely exclusively on the facts set forth in the pre-sentence investigation report. They further agreed that the prosecution would include on its brief on the *ex post facto* question a statement identifying the particular parts of



the record it considered relevant to the issue of aggravating and mitigating circumstances and that the defense would have an opportunity to respond. However, at no point did the defense attorney retreat from his earlier position that he intended to present his oral argument regarding mitigating circumstances at the time of sentencing, nor did he otherwise waive his right to present oral argument on the question whether Coleman should be sentenced to life or death. In fact, both defense counsel and the prosecution appeared at the next hearing anticipating, and prepared for, oral argument both on the issue of mitigation and the appropriateness of a death sentence.

The parties next met in court on July 10, 1978, this time for the sentencing proceeding. However, prior to the court session, the judge had already made his decision to order Coleman executed and had reduced it to its final written form. He distributed his written "Findings, Conclusions, Judgment and Order" to the parties at the outset of the proceeding. Subsequently, after counsel for the defendant again requested the opportunity to speak, the court allowed the parties to present their respective statements for and against the imposition of the death penalty.

The defense attorney made an emotional plea to the court. He pointed out that Nank—a white person who under his own version of the facts had participated equally in the crime—had been permitted to plea bargain and would be required only to serve a life sentence. Coleman, the defense reminded the court, had offered a similar plea which the prosecution had turned down. The defense attorney also reminded the court of the weakness of the case against Coleman, pointing out that it was

based almost exclusively on testimony of a codefendant that was hardly corroborated, if at all, by sparse and inconsequential circumstantial evidence. The defense urged the sentencing court to consider Coleman's spotless record prior to the events of July 4, 1974 and the information set forth in the presentence report. The document contained highly favorable reports by residents of Great Falls where Coleman had lived and worked. The defense finally called the court's attention to several aspects of Coleman's personality that were inconsistent with the crime he had been accused of committing, including his homosexuality and his nondominant personality.

The trial court then permitted the prosecution to make a statement. After the prosecution concluded, the court claimed to have considered "many of the arguments raised by the defense." It also said that "the one mitigating circumstance [was] that defendant ha[d] not prior to this time been convicted of any felony" but added "that this one circumstance [did] not overcome the aggravating circumstances. . . ." The court next simply read out loud the Conclusions and Judgment contained in the "Findings, Conclusions, Judgment and Order" that had previously been distributed. The Judgment the court read explicitly contradicted the court's oral statement that it had considered Coleman's lack of a criminal record as a mitigating factor and had concluded that it did not outweigh the aggravating circumstance. In the Judgment the court expressly stated that Coleman should be sentenced to death because it found that an aggravating circumstance (kidnapping resulting in death) existed beyond a reasonable doubt and "that *no* circumstances exist[ed] in

mitigation [emphasis supplied]." In its written decision, the court explicitly denied Coleman the mitigation credit that subsection (1) of the statute affords to all defendants who do not have a "significant history of prior criminal activity."<sup>25</sup> It denied such mitigation credit on account of an alleged burglary which codefendant Nank at one point in his trial testimony claimed he had perpetrated with Coleman in Roundup, Montana, on the morning of the day of the Harstad murder.<sup>26</sup>

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<sup>25</sup> The finding reads:

That the State has been unable to prove by means of record checks that the defendant has any other history of criminal activity. The only other criminal act which appears in the trial record in this cause is the aggravated burglary of a home in Roundup, Montana, where certain guns were stolen by the defendant and Robert Nank on July 4, 1974 [the date of the Harstad murder]. By reason of the foregoing, the credit in mitigation allowed by section 95-2206.9(1) is not appropriate to this defendant.

*Reprinted in Coleman II*, 185 Mont. 299, 390, 605 P.2d 1000, 1048 (1979) (Shea, J., dissenting), *cert. denied*, 446 U.S. 970 (1980).

<sup>26</sup> Moreover, the written document given to the parties at the outset of the hearing and thereafter filed was internally inconsistent. In the Findings section, the court wrote that the credit in mitigation provided in section 95-2206.9(1) [currently 46-18-304(1)] for having no significant history of prior criminal activity was not appropriate to Coleman. In the Conclusions section, however, the court stated "[t]hat the only mitigating circumstance technically present in this cause [was] that the defendant had no record history of prior criminal activity." On the basis of the document, therefore, it is not entirely clear whether or not the court gave Coleman credit in mitigation, as required by the death penalty statute, for having no significant history of prior criminal activity. However, the most reasonable

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In the "Findings, Conclusions, Judgment and Order," the court stated that none of the other mitigating circumstances enumerated in the statute, including the catchall provision embodied in subsection (8), were present in Coleman's case.<sup>27</sup> This statement, of course, meant that the court found that no mitigating circumstances at all existed, including those mitigating factors not explicitly listed in the statute but which the court is nevertheless required to consider; this despite the clear and unambiguous listing in the presentence report of a good number of mitigating facts and circumstances.

### C. Constitutional Deficiencies of Coleman's Sentencing

Coleman contends that his sentencing did not comport with the constitutional requirements imposed by the eighth and fourteenth amendments. He claims that he

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reading is that of the Montana Supreme Court. That court concluded that the sentencing judge found that Coleman was *not* entitled to mitigation credit under subsection (1) because of the alleged Roundup burglary. *Coleman II*, 185 Mont. at 331-32, 605 P.2d at 1019-20. See *infra* section III.C.2.b.11.

<sup>27</sup> The finding reads:

That there is no evidence appearing, either in the record of the trial held in this cause or the special sentencing hearing accorded, supporting a finding of any of the circumstances in mitigation under the other numbered paragraphs of Section 95-2206.9, namely paragraphs (2) through (8). There is, likewise, no evidence of any facts which are operative in this case to mitigate the penalty in this cause.

*Reprinted in Coleman II*, 185 Mont. at 390, 605 P.2d at 1048 (Shea, J., dissenting):

was deprived of his right to present argument at the time of sentencing and that as a result the court failed to "listen" to his views as to mitigating circumstances and the appropriateness of the death sentence. He also claims that the court did not consider the mitigating circumstances contained in the record. We must examine Coleman's contentions with special consideration and care. "When a defendant's life is at stake, [we must be] particularly sensitive to insure that every safeguard is observed." *Gregg v. Georgia*, 428 U.S. at 187 (plurality) (citations omitted).

1. *The Right to Present Argument at the Time of Sentencing.*

The trial judge committed constitutional error by deciding upon his Findings, Conclusions, Judgment, and Order, reducing them to writing in final form prior to the sentencing hearing, and distributing his written decision to the parties at the outset of that proceeding. After the judge distributed his written decision, counsel for Coleman asked the court for an opportunity to make an oral statement. The court acquiesced. The oral presentation that took place, however, constituted only a meaningless formality inasmuch as the court's decision had already been made.<sup>28</sup> After counsel concluded their remarks, the

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<sup>28</sup> At the earlier June 14th hearing, the court did, as the majority points out, indicate that it would "render its findings of fact and go up on the record that is present in the absence of any mitigating circumstances presented by the defendant at this hearing." Shockingly, this comment seems to suggest that the court had already reached its decision at that time - long



judge uttered a few comments and proceeded to read aloud the conclusions and judgment contained in the previously distributed written decision.

The eighth and fourteenth amendments require that capital sentencing proceedings afford a "meaningful opportunity for consideration of mitigating factors presented by the circumstances of the particular crime or by the attributes of the individual offender." *Roberts (Stanislaus) v. Louisiana*, 428 U.S. 325, 333-34 (1976) (plurality) (emphasis supplied). The empty charade that took place on July 10, 1978, did not provide Coleman with a meaningful opportunity to present his arguments regarding the existence of, and weight to be given to, his individual mitigating circumstances; nor did it permit him to advise the court why, in his view, the death penalty was not an appropriate punishment in his case.

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before the parties had any opportunity to comment on the issues – since the only way the decision would "go up" would be if capital punishment were imposed. The majority relies on the statement, however, to support the remarkable conclusion: "[g]iven the court's statement that it would prepare its Findings, we find unpersuasive the argument that the court's preparation of those findings for the July 10th hearing violated due process." Maj. op. at 602. The majority conveniently fails to mention that Coleman's attorney had requested, during that same June 14th hearing, an opportunity to make an oral argument on the issue of mitigation at the sentencing hearing, that no oral argument of any kind had been made by either party regarding the appropriateness of a capital sentence, and that the right to present oral argument at a capital sentencing hearing is fundamental.



The simple fact is that the trial court decided to have Coleman executed without the benefit of any argument by his attorney. The Supreme Court has rejected as erroneous the "premise that the participation of counsel is superfluous to the process of evaluating the relevance and significance of aggravating and mitigating facts." *Gardner v. Florida*, 430 U.S. at 360 (plurality). In *Gardner*, the Supreme Court stated that the adversary nature of our system of criminal justice requires that the trial court listen to the defendant on the issue of mitigating circumstances.

Our belief that debate between adversaries is often essential to the truth-seeking function of trials requires us also to recognize the importance of giving counsel an opportunity to comment on facts which may influence the sentencing decision in capital cases.

*Id.* In capital sentencing, where the judicial system has a paramount interest in ensuring that the right decision is made, the trial court must use, to the utmost extent, its most effective weapon in the quest for truth: adversarial exchange.

In *Eddings v. Oklahoma*, the Supreme Court underscored the importance of the defendant's participation when the sentencing court considers the existence of mitigating circumstances. After noting that the Oklahoma death penalty statute properly permits the defendant to present evidence "as to any mitigating circumstances", the Supreme Court declared that this is not enough. "Lockett," the Court said, "requires the sentencer to listen." *Id.* at 115 n.10 (emphasis supplied). See also *Sumner v. Shuman*, 107 S. Ct. at 2721-23 ("Beginning with *Lockett*

*v. Ohio*, a plurality of the Court recognized that in order to give meaning to the individualized-sentencing requirement in capital cases, the sentencing authority must be permitted to consider 'as a mitigating factor, any aspect of a defendant's character or record, and any of the circumstances of the offense.' " *Id.* at 2722 (quoting *Lockett v. Ohio*, 438 U.S. at 604) (emphasis in original)).

In the present case, one could hardly contend that the trial court "listen[ed]" to the defendant's position on the issue of mitigating circumstances. The trial judge made up his mind and determined both the form and substance of the sentence—before defense counsel had an opportunity to speak on the subject. The sentencing court's failure to "listen" is particularly troublesome in this case because the defense had decided not to call any witnesses and to rely exclusively on oral argument on the critical issues of mitigation and imprisonment vs. execution.<sup>29</sup> The procedure followed by the judge in determining to impose the death penalty effectively eliminated *any* role for Coleman's counsel.

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<sup>29</sup> The defense counsel's failure to present any direct testimony on the issue of mitigation necessarily raises the question whether Coleman's right to counsel was preserved at the sentencing stage. The sixth amendment "right to counsel is 'the right to the effective assistance of counsel.' " *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)). A claim of ineffective assistance of counsel requires a showing (a) "that counsel's performance was deficient" and (b) "that the deficient performance prejudiced the defense." *Id.* at 687. See also *Darden v. Wainwright*, 106 S. Ct. 2464, 2473-74 (1986). These standards apply to capital sentencing proceedings as well as to the trial itself. *Strickland v. Washington*, 466 U.S. at 686.

In *Coleman III* the Montana Supreme Court appears to have recognized that counsel was not afforded any opportunity to make an oral argument before the decision to execute was made. It described what occurred after the judge distributed his findings and conclusions as follows: "thereafter counsel for petitioner read into the record a prepared statement in mitigation." *Coleman III*, 633 P.2d 624, 632 (1981), *cert. denied*, 455 U.S. 983 (1982). Permitting counsel to read a statement into the record after a decision has already been made and reduced to final written

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In some cases, the failure to present evidence in mitigation in a capital sentencing proceeding has been held to constitute inadequate representation. *Jones v. Thigpen*, 788 F.2d 1101 (5th Cir. 1986); *Blake v. Kemp*, 758 F.2d 523 (11th Cir. 1985), *cert. denied*, 106 S. Ct. 374 (1985); *Tyler v. Kemp*, 755 F.2d 741 (11th Cir. 1985), *cert. denied*, 106 S. Ct. 582 (1985); *King v. Strickland*, 748 F.2d 1462 (11th Cir. 1984), *cert. denied*, 471 U.S. 1016 (1985); *Douglas v. Wainwright*, 739 F.2d 531 (11th Cir. 1984), *cert. denied*, 469 U.S. 1208 (1985). These courts have distinguished the cases before them from *Strickland v. Washington* by concluding that counsel performed inadequately and that the ineffective representation did, in fact, prejudice the defendant. The present case may be equally distinguishable. Here, defense counsel's performance may well have been inadequate and not simply a strategic choice. Compare *Strickland v. Washington*, 466 U.S. at 699; *Darden v. Wainwright*, 106 S. Ct. at 2475; *Burger v. Kemp*, 107 S. Ct. 3114, 3126 (1987). Also, in light of the weakness of the evidence against Coleman and the substantial testimony regarding mitigating circumstances that was available, the deficient performance may well have prejudiced Coleman. Coleman, however, has not made a claim of ineffective assistance of counsel in this habeas proceeding. This court, therefore, cannot reach that issue at this time.

form does not comport in any respect with the requirements of due process. The essential mandate of *Gardner*, that counsel have the "opportunity" at least to "influence the sentencing decision" necessitates reversal on this ground alone.

Though recognizing that Coleman was deprived of an opportunity to present oral argument at the time of sentencing, *see Coleman III*, 633 P.2d 624, 632 (1981), *cert. denied*, 455 U.S. 983 (1982), the Montana Supreme Court apparently believed that there was no right to such form of advocacy. The court's position in *Coleman III* appears to be that Coleman was given a chance to comment on the appropriate sentence in writing and that such an opportunity satisfies all constitutional and statutory requirements.

The problem with this analysis is, of course, that it does not recognize that Coleman has a right to *oral* argument at sentencing. Due process requires, even in a non-capital case, that the sentencing court grant defendant's request to comment orally on the appropriate sentence. *Ashe v. State of North Carolina*, 586 F.2d 334, 336 (4th Cir. 1978) ("[W]hen a defendant effectively communicates his desire to the trial judge to speak prior to the imposition of sentence, it is a denial of due process not to grant defendant's request."), *cert. denied*, 441 U.S. 966 (1978). Defendant may exercise his right to speak at sentencing through his attorney. For "[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932). *See also* Note, *Procedural Due Process of Judicial Sentencing for Felony*, 81 Harv. L. Rev. 821, 833 (1968) ("[T]he right to make allocutory and other legal

claims should be made effective by a right to counsel at sentencing, which may be regarded as the modern descendant of the right to allocution.”).

Here, Coleman had requested in advance an opportunity to speak, through his counsel, at the sentencing hearing but his request was effectively denied when prior to the hearing the judge made his decision in favor of execution. The sentencing judge thus in effect denied both Coleman and his counsel the right to speak on the subject of the sentence to be imposed.

The right to oral argument is a fundamental component of a fair sentencing hearing, especially when capital punishment is at stake. As the Supreme Court has said, “ ‘[a] hearing in its very essence demands that he who is entitled to it shall have the right to support his allegations by argument, however brief, and, if need be, by proof, however informal.’ ” *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 16 n.17 (1976) (quoting *Londoner v. Denver*, 210 U.S. 373, 386 (1908)). In *Londoner*, the Court held that an “opportunity . . . to submit in writing all objections . . . and complaints” is not enough, that the person entitled to a hearing has a right to make an oral argument. 210 U.S. at 386. The right to oral argument certainly cannot be denied in a hearing as critical as the one that takes place at the time of sentencing and particularly when that sentencing involves the issue of capital punishment.

The right to oral argument at sentencing goes hand in hand with the right to effective assistance of counsel. The Supreme Court has explicitly recognized the right to counsel during sentencing. *Mempa v. Rhay*, 389 U.S. 128



(1967). In the capital punishment context, the Court has stated: "the sentencing is a critical stage of the criminal proceeding at which [the defendant] is entitled to the effective assistance of counsel." *Gardner v. Florida*, 430 U.S. at 358 (plurality) (citing *Mempa v. Rhay* and *Specht v. Patterson*, 386 U.S. 605 (1967)). The right to counsel obviously entitles the defendant to more than the mere presence of a defense attorney.

If the values inherent in *Mempa* and *Gideon* are to be realized, the mere presence of counsel in the courtroom during sentencing will be inadequate. Counsel at the sentencing stage must be allowed to perform some of the functions which justify his presence.

Note, *Procedural Due Process at Judicial Sentencing for Felony*, 81 Harv. L. Rev. 821, 835 (1968). As the Seventh Circuit said in *Baker v. United States*, a noncapital case, the right to the effective assistance of counsel entitles defense counsel "to make any meaningful statement" during sentencing. 407 F.2d 618, 620 (7th Cir. 1968). Thus, there can be little doubt that the right to counsel implies, at the very least, the right to make an oral argument on the question whether a sentence of death should be imposed.

The majority opinion does not directly address this argument. Rather, the majority seems to suggest that Coleman waived his right to oral argument at the sentencing hearing. No other court has previously suggested that he did so. The majority's argument seems to be premised upon the fact that at the June 14th hearing Coleman's attorney told the court that Coleman would not present any witnesses to establish mitigating factors at the sentencing hearing. See maj. op. at 586-587, 604-605. The majority also relies on the fact that at this same June



14th hearing the court told Coleman's counsel that it "will render its findings of fact and go up on the record that is present . . . ," and defense counsel did not object.

The simple fact is that at no time during the hearing did either party waive its right to oral argument. To the contrary, Coleman's counsel explicitly declared that both sides should be given an opportunity to make an oral argument during the July sentencing hearing. Moreover, as mentioned *supra*, both parties appeared at the July sentencing hearing anticipating, and prepared for, oral argument on the issue of mitigation and the proper sentence to be imposed.<sup>30</sup> While defense counsel did not

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<sup>30</sup> In an apparent attempt to support its waiver argument, the majority notes that "[t]he trial court . . . agreed to accept a brief from the State and from Coleman's counsel specifically discussing the relevant aggravating and mitigating circumstances," and cites *Coleman III*. Maj. op. at 592. Presumably, the majority intends to imply that the parties proposed commenting on the aggravating and mitigating circumstances by brief rather than by oral argument. *Coleman III*, however, does not support this implication. The Montana Supreme Court never suggested that Coleman had waived his right to oral argument. Instead, that court, as explained *supra*, incorrectly assumed that Coleman had no right to oral argument at sentencing. Furthermore, it is clear from the record that Coleman did not waive his right to oral argument. In fact, defense counsel stated at the June hearing that he wanted to make an oral argument at the sentencing hearing. The trial court and the prosecution did not object to the defense's proposal that the issue of mitigation be decided at a later date on the basis of oral argument. At no point did Coleman's counsel agree to forego oral argument. Rather, when the prosecutor agreed to incorporate his page citations (to the portions of the trial

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intend to present witnesses at the sentencing hearing, he nevertheless intended to make, and did indeed make, arguments relevant to Coleman's sentence – but only after the court had distributed its final written Findings, Conclusions, Judgment, and Order. Surely no waiver of oral argument can be implied from the fact that a party does not desire to present witnesses.

Nor can a waiver be implied from the court's statement that it intends to make findings of fact and go on

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transcript he intended to rely on for his sentencing argument) in his reply brief on the *ex post facto* issue, instead of reading them aloud at the hearing then in progress, Coleman's counsel was afforded an opportunity to do likewise. Finally, it appears from the record that Coleman's counsel did not file a brief on the issue of mitigation. Certainly, none is contained in the record we received. The Montana Supreme Court made inconsistent statements on this issue. *Compare Coleman II*, 185 Mont. at 329, 605 P.2d at 1018 ("the defendant . . . did not take advantage of the District Court's offer to accept proposed findings and conclusions from the parties with respect to the sentence") with *Coleman III*, 633 P.2d 624, 632 (1981) ("Both the petitioner and the State . . . submitted their briefs and findings and conclusions. . . ."), *cert. denied*, 455 U.S. 983 (1982). In *Neuschafer v. McKay*, "the district court was presented with conflicting, or at least inconsistent, conclusions by two state courts on the critical point in the case. It could not render a decision on the record before it without second-guessing at least one state tribunal." 807 F.2d 839, 841 (9th Cir. 1987). In *Neuschafer*, we decided that the district court should have held a hearing on the issue. *Id.* at 841-42. Here, in the absence of a hearing, we must assume the version of the disputed facts that is most favorable to petitioner. We must, consequently, assume that the defendant did not file a brief on the issue of mitigation.

the present record, and Coleman's failure to object. The majority takes the court's statement out of context. It was made after a long exchange between defense counsel and the court regarding whether Coleman would have to testify, since the prosecution asked that Coleman be subject to cross-examination. The court agreed with defense counsel that Coleman need not be compelled to testify, stating that the court would render its findings of fact and go up on the present record. That Coleman's counsel did not object is understandable given this context, for the judge was making a ruling in his favor wholly unrelated to his right to present oral argument. Furthermore, the court's statement, even taken out of context, would be insufficient to provide a waiver, since the waiver of a fundamental right must be explicit, intelligent, and voluntary.

The majority does not contend that because the distributed Findings were unsigned they were simply proposed rather than final findings.<sup>31</sup> Nor does the majority

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<sup>31</sup> The judge at all times treated his written findings as final, and never as proposed or somehow tentative. Indeed, at the beginning of the sentencing hearing, the judge handed the parties a written document in final form containing its Findings, Conclusion, Judgment, and Order, and not just a draft of proposed or tentative findings. Furthermore, the Montana Supreme Court stated that "[a]t the beginning of the July 10 hearing, the trial judge submitted to petitioner's counsel and State counsel his findings and conclusions and thereafter counsel for petitioner read into the record a prepared statement in mitigation." *Coleman III*, 633 P.2d at 632. In an earlier opinion,

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contend that Coleman does not possess the right under the Constitution to present oral argument. Rather, the majority simply disregards the evidence showing that Coleman did not waive his rights and instead in a conclusory fashion assumes that he did. In an equally cavalier manner, the majority disregards the mandate of the Supreme Court in *Barker v. Wingo*, 407 U.S. 514, 525-26 (1972): "Courts should 'indulge every reasonable presumption against waiver,' *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937), and they should 'not presume acquiescence in the loss of fundamental rights,' *Ohio Bell Tel. Co. v. Public Utilities Comm'n*, 301 U.S. 292, 307 (1937)." The waiver of a fundamental right must be explicit, intelligent, and voluntary. Here, at the very most, the majority can point to a few ambiguous phrases in the record. Under the exacting *Barker* standards it seems apparent

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the Montana Supreme Court put it even more clearly. The court said: "The District Court handed counsel for defendant and the State, a copy of its written findings, judgment and order." *Coleman II*, 185 Mont. at 307, 605 P.2d at 1006. At no time did the Montana Supreme Court characterize the judge's written decision as tentative or proposed.

The majority, too, seems to recognize that when the trial judge arrived at the July 10th hearing he had already made his decision. The majority tells us that, after the written decision was distributed, "[d]efense counsel then read into the record a statement he had prepared on Coleman's behalf." Maj. op. at 588. That characterization of the events makes it clear that the oral argument that took place on July 10 was, for purposes of sentencing, nothing more than an empty gesture, and that its only function, if any, was to permit counsel to preserve the record for appeal.

that the majority's suggestion that Coleman waived his right to oral argument is patently erroneous.

Coleman like all persons facing capital punishment has a constitutional right to have the sentencer listen to his arguments before deciding on his punishment. He was improperly deprived of that fundamental right. The death penalty imposed on him violates the due process clause as well as the eighth amendment and, consequently, cannot stand.

## *2. Mitigating Circumstances*

Even had the trial court delayed deciding on the death sentence until after it had heard counsel's arguments, we would be compelled to reverse – both on the ground that it failed to consider a number of mitigating circumstances and on the ground that it unlawfully considered a highly prejudicial adverse circumstance. The court inadvertently or deliberately failed to consider the evidence regarding Coleman's character and background (other than that relating to the presence or absence of a criminal record) and improperly based its decision in part on his alleged commission of an unadjudicated offense.

### *a. Character and Background as Mitigating Factors*

#### *(i) General Rule*

The Supreme Court has recently reiterated that the Constitution requires that the capital defendant be allowed to introduce any relevant mitigating evidence regarding his character or record and any of the circumstances of the offense. *California v. Brown*, 107 S. Ct. 837,



339 (1987). "Consideration of such evidence is a 'constitutionally indispensable part of the process of inflicting the penalty of death' ". *Id.* (quoting *Woodson v. North Carolina*, 428 U.S. at 304 (plurality)). In *Eddings*, the Supreme Court stated unequivocally that "the state courts must consider all relevant mitigating evidence and weigh it against the evidence of aggravating circumstances." 455 U.S. at 117 (emphasis supplied). Last year, the Court posited, as a well-established rule "that the sentencer may not refuse to consider or be precluded from considering 'any relevant mitigating evidence.' " *Skipper v. South Carolina*, 106 S. Ct. 1669, 1671 (1986) (quoting *Eddings*, 455 U.S. at 114). See also *Hitchcock v. Dugger*, 107 S. Ct. 1821, 1824 (1987).

The sentencing court has an obligation to consider mitigating factors even though it has no duty to give them overriding weight. "The sentencer, and the Court of Criminal Appeals on review," the Supreme Court declared in *Eddings*, "may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration." 455 U.S. at 114-15. See also *id.* at 117. By the same token, the sentencing court, under Montana's death penalty system, may decide whether the mitigating factors are sufficiently substantial to call for leniency. But it must consider those factors, not exclude them from its deliberations.

The Supreme Court has repeatedly and specifically held that a capital sentencing court must consider the character and background of the accused. See, e.g., *Sumner v. Shuman*, 107 S. Ct. at 2721-26; *California v. Brown*, 107 S. Ct. at 839; *Zant v. Stephens*, 462 U.S. at 879; *Eddings v. Oklahoma*, 455 U.S. at 112; *Lockett v. Ohio*, 438 U.S. at



604-06 (plurality); *Woodson v. North Carolina*, 428 U.S. at 304 (plurality); *Roberts (Stanislaus) v. Louisiana*, 428 U.S. at 333 (1976) (plurality). In *Woodson*, the Court said,

A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.

428 U.S. at 304 (plurality).

As Justice O'Connor explained in *California v. Brown*, "evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *California v. Brown*, 107 S. Ct. at 841 (O'Connor, J., concurring). Accordingly, a sentencing judge must take these factors into account when deciding whether to order that a defendant be executed. In *Hitchcock v. Dugger*, the Court held that, unless the state proves the error to be harmless, the failure to consider mitigating evidence pertaining to the defendant's character and background "renders the death sentence invalid." 107 S. Ct. at 1824.

(ii) Specific Mitigating Circumstances in Coleman's Case

The presentence investigation report addressed the mitigating circumstances in Coleman's background. In his dissent in *Coleman II*, Justice Shea summarized the pertinent contents of that report. Because I consider the mitigating circumstances to be substantial and deserving of thoughtful consideration before a decision is made that Coleman should or should not be hanged, I quote Justice Shea's summary in its entirety.

Dewey Coleman is a black man, born October 26, 1946, in Missouri, the son of a boilermaker and housewife. There were nine brothers and sisters in his family. At the age of fourteen, he ran away from home, but some time later he returned to Missouri. He graduated from high school in 1964. His father died in 1964 and his mother died in 1972. As of January 20, 1975, only four brothers and sisters were known by him to be alive. He apparently has had no contact with his family since that time.

From 1965 to 1972, he was in the United States Navy. He was discharged in 1969 but was recalled to active duty very shortly thereafter. He attained the rank of E-5 and was primarily involved in doing clerical work. During this time he also received approximately two years of education at a junior college and through correspondence courses. He received his discharge from the Navy in 1973 and apparently is on disabled classification as a result of a service-connected activity.

In 1973, he came to Great Falls, Montana, in part because he wanted to remove himself from the drug scene. He had used drugs on and off since the young age of 12 or 13 when he and his friends smoked marijuana that was growing wild near his home in

Missouri. He later became involved with using cocaine, amphetamines and heroine [sic].

Upon his arrival in Great Falls, Montana, he became actively involved with Opportunity Incorporated, a community action low income coalition of individuals who worked for welfare rights and the betterment of low income people. While associated with Opportunity Incorporated he became founder and president of L.I.N.C. (Low Income Neighbors Coalition). He helped organize a Christmas program for low income youngsters in the Great Falls area, and provided the time and initiative to get several projects developed before he left in May 1974 for the Veteran's Hospital in Sheridan, Wyoming.

Insofar as can be determined, defendant had never been convicted of even a misdemeanor charge. Indeed, he has not even been arrested for any offense. The parole and probation officer spoke with several individuals in Great Falls concerning Coleman, and he stated in his report:

This writer spoke with several individuals associated with the subject and familiar with his work in the Great Falls area and everyone that I talked with was complimentary of this individual's work and viewed with some disbelief the crime this individual has committed.

After his arrest, several persons performed psychological testing of defendant, and their diagnoses ranged from such determinations as paranoid schizophrenia; schizodal personality; organic brain syndrome; depressive reaction; a patient with passive-aggressive personality; aggressive personality disorders; and depressive reaction with anxiety (Depressive Neurosis).

*Coleman II*, 185 Mont. 299, 356-57, 605 P.2d 1000, 1032-33 (1979) (Shea, J., dissenting), cert. denied, 446 U.S. 970 (1980).

Although, as Justice Shea acknowledged, the profile is not complete, the contents of the presentence report make it clear that many of Coleman's personal circumstances (in addition to his lack of a criminal record) were relevant to the issue of mitigation and should have been taken into account by the sentencing judge. For example, the sentencing court had a constitutional obligation to take into account Coleman's underprivileged and harsh childhood and adolescence, his military service, his good reputation in his neighborhood, his community service, and his psychological disorders. However, it is clear from the record and from the written findings that the judge failed to give any consideration whatsoever to any of those mitigating circumstances.

The majority states that the judge made the presentence investigation report part of the record and that we can assume, therefore, that he took Coleman's background into account. That assumption runs counter to the court's own findings as well as to the mandate of *Gardner*.

(iii) The Trial Court's Failure to Consider Coleman's Character and Background

In the present case, while the sentencing court considered Coleman's prior criminal "record," it clearly did not consider Coleman's character and background. Nothing in the sentencing hearings or in the written "Findings, Conclusion, Judgment and Order" warrants the conclusion that the judge recognized, or gave any consideration to, the mitigating character and background factors described in the presentence investigation report and in the defense's oral statement. There is no mention of any of those elements in the written sentencing decision

or in the oral comments the judge made at the sentencing hearing. At no point did the judge make any reference to the mitigating circumstances in Coleman's background or character. Instead, he mentioned only an entirely different category of mitigating circumstance when he said: "The *one* mitigating circumstance is that the defendant has not prior to this time been convicted of any felony [emphasis supplied]. . . ." <sup>32</sup> Moreover, in the "Findings, Conclusions, Judgment and Order", the judge asserted "[t]hat the *only* mitigating circumstance technically present in this cause is that the defendant has no record history of prior criminal activity [emphasis supplied]."

Under the Montana capital punishment statute a defendant's criminal record is different than and treated separately from mitigating circumstances relating to his character and background. The statute requires the court to consider a defendant's criminal record under subsection (1) and character and background under the catchall provision, subsection (8). The catchall provision requires the court to consider any fact or circumstance that "exists in mitigation of the penalty" excluding only those already covered by subsections 1-7. An analysis of the statutory framework reveals that the catchall provision includes most of the mitigating circumstances that Justice O'Connor expressly described in *Brown* and that the Court in *Hitchcock* held must be considered if the death penalty is to stand.

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<sup>32</sup> Despite having said this, the court did not give Coleman any mitigation credit in his findings. See *supra* notes 25-26 and accompanying text.

After completing its discussion of Coleman's prior criminal record under subsection (1), the sentencing court expressly found that there was *no evidence* of any mitigating circumstances under the catchall provision. The Court found:

That there [was] *no evidence* appearing, either in the record of the trial held in this cause or the special sentencing hearing accorded, supporting a finding of any of the circumstances in mitigation under the other numbered paragraphs of Section 95-2206.9, namely paragraphs (2) through (8). There is, likewise, *no evidence* of any facts which are operative in this case to mitigate the penalty in this cause [emphasis supplied].

It seems clear that the reason the court failed to find any evidence of any mitigating circumstances under subsection (8) was either that the judge was not aware that the mitigating facts set forth in the presentence report existed or that he did not recognize that those facts constitute mitigating circumstances under *Lockett*. Whatever the reason, the court failed to consider the mitigating circumstances relating to Coleman's character and background when performing the crucial function of weighing aggravating and mitigating factors.

To put it clearly, the issue is not whether the judge weighed the circumstances properly or gave them sufficient significance. Had the judge considered the mitigating factors that were present under subsection (8) and found them "not sufficiently substantial to call for leniency," 95-2206.10, no constitutional violation would have occurred. That, however, is simply not what transpired here. The record before us reveals that the court



simply was unaware of or failed to consider Coleman's character and background.

(iv) The Errors in the Majority's Analysis

The majority chooses to ignore the overwhelming specific evidence showing that the trial court did not consider Coleman's background and character and instead accept uncritically the trial judge's general boilerplate assertions that he reviewed and considered all relevant materials. The majority states that during both the June 14th and the July 10th hearings, "the court stated several times, without challenge, that it had read and considered all materials submitted." Maj. op. at 592.<sup>33</sup> During the June 14th hearing, however, the court only declared that it had "before it all matters during the course of the trial [and had] heard the testimony relating to the aggravating circumstances and also some to mitigating circumstances." (There was of course no such testimony before the judge other than that which was offered at the time of trial for the purpose of establishing Coleman's guilt or innocence.) The trial court also stated that it had "called for and received a presentence report, which [it then] cause[d] to be filed in accordance with law." The court did not say, however, that it had considered the parts of such report pertaining to Coleman's character and background. The trial court simply noted

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<sup>33</sup> Since Coleman apparently did not file a brief on the issue of mitigation, *see supra* note 30, and since his oral argument took place after the court had decided to impose the death penalty, it is far from clear what the majority is referring to by "all materials submitted."

that "[t]he significant part of [the report] relative to mitigating circumstances, is that the defendant has never been convicted of any felony prior to this charge." At no time did the court specifically assert that it had read the entire presentence report.

In the July 10th hearing the trial judge told the parties before the oral arguments: "I want you to know that I have considered all of - everything that you have submitted and have given it thought, and that this isn't just a matter that the court takes lightly." (It is significant that at this point the defendant apparently still had submitted nothing to the court - he had filed no brief or other written document on the subject of mitigating circumstance or the appropriateness of punishment, *see supra* notes 28 & 30, and had made no oral argument on that subject.) It does not appear that this statement refers to the presentence investigation report since that report was not submitted by either of the parties.

After counsel made their oral remarks, the judge again stated: "I have not looked at the points that have been raised lightly, but many of the arguments raised by the defense, of course have been considered heretofore."<sup>34</sup> Finally, in its "Findings, Conclusions, Judgment and Order" the court stated that it had "reviewed all matters submitted." Such boilerplate statements are entitled to little weight in a capital punishment case.

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<sup>34</sup> If one were to give this statement any weight at all, it would have to be noted that some, if not most, of the arguments had not previously been raised; moreover, as I have already mentioned, the points made in the oral presentation could not have been considered, since the court had made its decision prior to the time the presentation occurred.

What is most important is that the trial court never specifically claimed to have read the portions of the presentence investigation report pertaining to Coleman's background and character, let alone to have *considered* any of the relevant aspects of his life. Nor is there any indication in any of the court's remarks of any awareness of any facts or circumstances relating to Coleman's history. The court's formalistic general assertions that it had considered all the arguments are insufficient to overcome the absence of any reference to the various mitigating facts and circumstances mentioned in the presentence report and the court's own specific findings and conclusions to the contrary. The written findings demonstrate that the *only* mitigating circumstance the court considered was the absence of a criminal record; they further show that the court was cognizant of *no* mitigating circumstances relating to Coleman's character and background.

The majority cites from *Coleman II* to support the proposition that the trial court considered all of the evidence and materials presented in rendering its Findings regarding mitigation. Maj. op. at 591. The majority's reliance on *Coleman II* in [sic] misplaced. *Coleman II* does not say, anywhere, that the trial court considered any of the evidence in mitigation other than Coleman's lack of a prior record. To the contrary, *Coleman II* seems to support the conclusion that the trial court did *not* consider the other evidence in mitigation – i.e., Coleman's character and background. The Montana Supreme Court in *Coleman II*, though recognizing that the presentence investigation report included information both on Coleman's record of no prior convictions and on his character and background

states only that the sentencing court considered the former. "[T]he District Court," *Coleman II* says, "did consider the mitigating circumstance of defendant's lack of a criminal record but concluded this circumstance was offset by evidence that defendant had committed a burglary on the same day the kidnap, rape and homicide occurred." 185 Mont. at 332, 605 P.2d at 1019. The opinion makes no claim that the trial judge considered Coleman's character or background and nowhere discusses any of *those* mitigating circumstances. The majority thus is simply in error when it states that the Montana Supreme Court found that the sentencing court considered *all* of the mitigation evidence, including that pertaining to Coleman's character and background.<sup>35</sup>

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<sup>35</sup> In this part of its opinion the majority relies entirely on several cases decided by the eleventh circuit: *Johnson v. Wainwright*, 778 F.2d 623 (11th Cir. 1985); *Funchess v. Wainwright*, 772 F.2d 683 (11th Cir. 1985), *reh'g denied en banc*, 776 F.2d 1057, *cert. denied*, 106 S. Ct. 1242 (1986); *Raulerson v. Wainwright*, 732 F.2d 803 (11th Cir. 1984), *cert. denied*, 469 U.S. 966 (1984); *Palmes v. Wainwright*, 725 F.2d 1511 (11th Cir. 1984), *cert. denied*, 469 U.S. 873 (1984); *Dobbett v. Strickland*, 718 F.2d 1518 (11th Cir. 1984), *cert. denied*, 468 U.S. 1220 (1984). See maj. op. at 593. The eleventh circuit's view appears to conflict with *Gardner*, see *infra* discussion in subsection (vi), and with *Lockett* and Justice O'Connor's [sic] clear statement in *Eddings*, see *infra* discussion subsection (v). Equally important, however, the cases are all readily distinguishable. In each of the eleventh circuit cases the court held that the sentencing judge was not required to specify mitigating circumstances when it was clear from the record that he had taken those circumstances into account. In *Johnson v. Wainwright*, the eleventh circuit expressly agreed "with the district court that the sentencing order read in its entirety, combined with the court's instructions to the jury, indicates that the trial court gave adequate consideration to the

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evidence presented [pertaining to non-statutory mitigating circumstances]." 778 F.2d at 629. Similarly, in *Funchess v. Wainwright* the eleventh circuit stated:

The trial court considered this evidence [relating to non-statutory mitigating circumstances] but was *obviously* not persuaded that it justified the establishment of any non-statutory mitigating factors. Consequently, the trial judge did not include a detailed discussion regarding these alleged circumstances in his findings of fact.

772 F.2d at 693 (emphasis supplied). In *Raulerson v. Wainwright*, the eleventh circuit declared: "*it is evident* from the record before us that the trial judge did consider the evidence but concluded that it did not outweigh the factors militating in favor of the death penalty." 732 F.2d at 806 (emphasis supplied). In *Palmer v. Wainwright*, the court wrote:

Here the trial judge patiently heard all of the evidence appellant had to offer. . . . *There is no indication whatsoever* that the trial judge did not conscientiously consider everything presented.

725 F.2d at 1523 (emphasis supplied). Finally, in *Dobbert v. Strickland*, the eleventh circuit announced: "our analysis of the record reveals that both the order of the trial court and the decision of the Florida Supreme Court reflect consideration of all mitigating evidence put on by Dobbert, statutory and non-statutory." 718 F.2d at 1523.

Contrary to the circumstances in the case before us, in each of the eleventh circuit cases the defendants had actually introduced evidence on the mitigating circumstances during the sentencing proceedings. Thus, in each case the judge had personally admitted all of the evidence in question and had listened to all of the pertinent testimony. In none of the eleventh circuit cases was the only source of mitigating evidence a written document. The eleventh circuit's conclusion that the mitigating factors were actually considered thus finds some

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- (v) Even Were it Only "Unclear" whether the Trial Court Considered the Mitigating Factors, Reversal Would be Required.

While it is relatively clear that the judge failed to consider Coleman's character and background, it is not necessary that we be certain that such was the case. Reversal is required where there is any *doubt* as to whether the judge actually considered the mitigating evidence pertaining to the defendant's character and background. *Lockett* establishes that even the "risk [of] the death penalty [being] imposed in spite of factors which may call for a less severe penalty . . . is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." 438 U.S. at 605 (plurality). See also *Turner v. Murray*, 106 S. Ct. 1683, 1688 (1986) (plurality). Justice O'Connor stated expressly that ambiguity or doubt regarding the question whether the judge considered all the mitigating factors requires reversal.

[We] may not speculate as to whether the trial judge . . . actually considered all of the mitigating factors and found them insufficient to offset the aggravating circumstances. . . . *Woodson* and *Lockett* require us to remove any legitimate basis for finding

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actual support in the record in each case. Unlike the majority, the eleventh circuit relied on the facts and circumstances in the record and not solely on boilerplate statements as its basis for concluding that the judge had considered the mitigating circumstances not specifically mentioned. Finally, in none of those cases did the trial judge specifically make findings that indicated an unfamiliarity with the existence of the pertinent mitigating circumstances and that directly contradicted the undisputed facts in the presentence report with respect to the existence of those circumstances.



ambiguity concerning the factors actually considered by the trial court.

*Eddings v. Oklahoma*, 455 U.S. at 119 (O'Connor, J., concurring), cited in *Sumner v. Shuman*, 107 S. Ct. at 2722 n.4. Similarly, in the present case we should not hesitate to reverse the death penalty in light of "mitigating information that *may not have been considered* by the trial court in deciding whether to impose the death penalty or some lesser sentence." *Eddings*, 455 U.S. at 119 (O'Connor, J., concurring) (emphasis supplied).

(vi) The Constitution Requires the Court to Specify the Mitigating Factors Considered

In my view, the constitution requires that the court specify the mitigating circumstances considered when a death penalty is imposed. I believe that *Gardner* requires such a rule:

Since the State must administer its capital sentencing procedures with an even hand, see *Proffitt v. Florida*, 428 U.S. [242,] 250-253 [(1976)], it is important that the record on appeal disclose to the reviewing court the considerations which motivated the death sentence in every case in which it is imposed. Without full disclosure of the basis for the death sentence, the Florida capital-sentencing procedure would be subject to the defects which resulted in the holding of unconstitutionality in *Furman v. Georgia*.

*Gardner v. Florida*, 430 U.S. at 361 (plurality). The majority seems to believe that *Gardner* means only that the reviewing court must be able, from looking at the record, to discern considerations present that could *in theory* have been relied on by the sentencing court in reaching its decision to impose a capital sentence – regardless of what factors the judge *actually* relied on. I think that *Gardner*

quite clearly demands more. In my opinion, it requires the sentencing judge to specify the considerations that *actually* motivated his decision – those that militated in favor of his decision and those that weighed in favor of leniency. Only then can a reviewing court determine whether the judge considered those factors – as the Constitution requires him to.

When the Supreme Court asks for a “full disclosure of the basis for the death sentence,” it is obviously requiring an affirmative act by the sentencing judge. It is telling sentencing judges to make their death penalties lawful and reviewable by specifying the considerations upon which they relied. This does not mean mentioning only those factors that support the court’s decision. It means also identifying the considerations that support leniency but are insufficient in the judge’s view to warrant that result. Here, the judge simply said there were no such considerations, although clearly a number of them were set forth in the record and not disputed.

In short, to comply with *Gardner*, the sentencing court must explicitly discuss the evidence in mitigation. The court need not provide an extensive excursus into each mitigating circumstance but must at least identify those which affect its decision, including those it finds insufficient to warrant leniency.

Inasmuch as the Constitution makes unacceptable the risk of imposing the death penalty without certitude that the sentencing judge has considered the mitigating circumstances, *see supra* subsection (v), there seems to be no reasonable alternative to requiring sentencing judges to specify the factors actually taken into account. In the

absence of such a requirement, reviewing courts would be required to speculate as to what factors the sentencing judge considered in deciding to impose the death penalty. That is precisely what the majority does here: speculate – in all probability erroneously – as to what the sentencing judge actually considered.

Supreme Court decisions “indicate that the discretion of the sentencing authority [in death penalty cases] must be limited and *reviewable*.” *Spaziano v. Florida*, 468 U.S. 447, 462 (1984) (emphasis supplied). In *Woodson*, the Court established that *Furman* imposes on the state, as a “basic requirement”, the obligation to “make rationally reviewable the process for imposing a sentence of death.” 428 U.S. at 303 (plurality). See also *McKenzie v. Risley*, 801 F.2d 1519, 1528 (9th Cir. 1986) (“The primary concerns the Supreme Court has expressed in discussing the death penalty have been the need for guidance of the fact finder’s discretion and an opportunity for review of the exercise of that discretion.”), *petition for reh’g en banc granted*, 815 F.2d 1323 (9th Cir. 1987). Requiring the sentencing judge to specify each of the mitigating circumstances present provides courts of appeal with a *reviewable* record. In addition, such a rule forces the sentencer to consider the mitigating factors individually and to be more conscientious than he might otherwise be.

The majority cites two Supreme Court cases in which jury imposed death penalties were affirmed although the juries were not required to specify the aggravating and mitigating circumstances that served as a basis for their decisions. *Jurek v. Texas*, 428 U.S. 262 (1976); *Gregg v. Georgia*, 428 U.S. 153 (1976). In neither of those cases, however, did the defendant raise the issue of the need for

specific findings as to aggravating and mitigating circumstances and the Court, not surprisingly, did not rule on the question. Moreover, both of these cases were decided prior to *Gardner*, in which the Court first expressly required a "full disclosure of the basis for the death sentence," 430 U.S. at 361.<sup>36</sup> Thus, *Gregg* and *Jurek* in no way derogate from the *Gardner* requirement. Accordingly, we need not consider here whether the constitution would permit the application of different standards in jury ordered death penalty cases.

None of the three other Supreme Court cases which the majority cites supports the view that the trial judge need not specify the mitigating circumstances considered in deciding to impose the death penalty. *Baldwin v. Alabama*, 472 U.S. 372 (1985); *Spaziano v. Florida*, 468 U.S. 447 (1984); *Proffitt v. Florida*, 428 U.S. 242 (1976). All of these cases involved statutes that required the sentencing judge to make written findings on the mitigating circumstances. The Alabama statute in *Baldwin* required courts imposing a death sentence "to set forth in writing the factual findings from the trial and sentencing hearing, including the aggravating and mitigating circumstances that formed the basis for the sentence." *Baldwin v. Alabama*, 472 U.S. at 376. The Florida statute in *Spaziano* required the trial judge "to conduct an independent review of the evidence and to make his own findings regarding aggravating and

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<sup>36</sup> It is worth noting that in *Gregg* the Court by way of dictum took its first step toward the *Gardner* requirement, saying, "[w]here the sentencing authority is required to specify the factors it relied upon in reaching its decision, the further safeguard of meaningful appellate review is available. . . ." 428 U.S. at 195 (plurality).

mitigating circumstances. If the judge imposes a sentence of death, he must set forth in writing the findings on which the sentence is based." 468 U.S. at 466. In *Proffitt*, the death penalty statute also required the judge to file written findings on the aggravating and mitigating circumstances. 428 U.S. at 250 (plurality). In none of these cases did the defendant allege that there were mitigating circumstances which the sentencing judge had failed to discuss in his findings. The majority simply misreads these cases when it states that in all of them the trial judge failed to discuss "factors dealing with a defendant's personal history considered by the judge but rejected." Maj. op. at 597-598. In short, the majority simply errs both with respect to the law and the facts. The issue whether the sentencing court must discuss mitigating circumstances relating to character and background was neither presented nor considered in any of these cases.

In sum, it is constitutionally required that judges who decide to impose the death penalty make specific findings on the mitigating circumstances presented.

b. *Consideration of the Unadjudicated Offense*

(i) Introduction

The trial court's decision to order Coleman's execution was based in part on its assumption that he had committed an unadjudicated offense. Because of the importance of the "quality" of the information relied on by a capital sentencer, *Gardner v. Florida*, 430 U.S. at 359 (plurality), and because of the centrality of the defendant's record in capital sentencing, the Constitution does not permit the capital sentencer to rely on unadjudicated

offenses. Coleman's death penalty should be reversed for this reason alone. Moreover, the use of the unadjudicated offense by the judge in this case violates the notice requirement of the due process clause.

(ii) The Judge Based Coleman's Sentence in Part on an Unadjudicated Offense

During cross-examination at trial, Nank declared that on the day of the Harstad murder, Coleman had participated with him in the burglary of a home in Roundup, Montana. Although the sentencing court's statements are somewhat contradictory, it seems reasonably clear that, as the Montana Supreme Court found, the judge based his decision to impose the death penalty partially on Nank's allegations – in other words on an unadjudicated offense.

In the findings portion of the "Findings, Conclusions, Judgment and Order", the sentencing judge declared unequivocally that he was relying on the Roundup burglary as the basis for denying Coleman his statutory credit in mitigation under subsection (1) – credit for not having any prior criminal convictions. In the Findings, the judge declared:

The only other criminal act which appears in the trial record in this cause is the aggravated burglary of a home in Roundup, Montana, where certain guns were stolen by the defendant and Robert Nank on July 4, 1974. By reason of the foregoing, the credit in mitigation allowed by Section 95-2206.9(1) is not appropriate to this defendant.

*Reprinted in Coleman II*, 185 Mont. at 390, 605 P.2d at 1050 (Shea, J., dissenting). In the conclusions the judge was more equivocal. He stated:



That the only mitigating circumstance technically present in this cause is that the defendant has no record history of prior criminal activity.

*Reprinted in Coleman II*, 185 Mont. at 391, 605 P.2d at 1051 (Shea, J., dissenting). The only reasonable reading of the two statements is that the judge concluded that whether or not Coleman had a technically clean record the unadjudicated offense served to deprive him of the mitigation credit he would otherwise have received.

The clear import of the sentencing judge's written findings and conclusions is not affected by the fact that after counsel read his oral argument into the record the judge mischaracterized his own findings and conclusions. In his comment made just prior to reading the sentence and judgment the judge directly contradicted his written findings. He said "[t]he one mitigating circumstance is that the defendant has not prior to this time been convicted of any felony but in view of the enormity of the crime committed, and the Court's feeling that this one circumstance does not overcome the aggravated circumstances, I have made findings to this effect, written findings as required by the law [emphasis added]." In fact, his "written findings" bore no similarity to his oral description of them. The judge did not make written findings that the mitigating circumstance was outweighed by the aggravating circumstance. To the contrary, he found that no mitigating circumstance existed under subsection (1) or any other subsection. As the Montana Supreme Court accurately explained it, the sentencing judge found that the Roundup incident outweighed the defendant's prior clean record and therefore the subsection (1) mitigation credit would not be

afforded. *Coleman II*, 185 Mont. at 332, 605 P.2d at 1019-20. Thus, the judge found there was no mitigating circumstance to weigh against the aggravating circumstance. Under these circumstances, imposition of the death penalty became *mandatory*.

We review the sentencing judge's written findings and conclusions and not his oral statements. As we said in *Hong v. United States*, when "the [trial court] make[s] and enter[s] detailed findings of fact and conclusions of law, we are of the view that we need not, and should not, on . . . appeal, review [the court's oral] statements." 363 F.2d 116, 120 (9th Cir. 1966). See also *E.E.O.C. v. Exxon Shipping Co.*, 745 F.2d 967, 974 (5th Cir. 1984) ("to the extent the [trial] court's statements from the bench conflict with its formal findings and conclusions, we do not consider them"); *Harbor Tug & Barge v. Belcher Towing*, 733 F.2d 823, 827 n.3 (11th Cir. 1984) ("The trial judge was not bound by his off-hand remarks. In its search for error, the reviewing court looks to the formal findings and conclusions. . . ."); *White v. Washington Public Power Supply System*, 692 F.2d 1286, 1289 n.1 (9th Cir. 1982) ("the rule of this circuit is that the formal findings of fact and conclusions supersede the oral decision").

The Montana Supreme Court found that the sentencing court had considered the Roundup burglary and, on account of it, gave Coleman no mitigation credit for his record of no prior convictions. *Coleman II* states that "the District Court did consider the mitigating circumstance of defendant's lack of a criminal record but concluded this circumstance was offset by evidence that the defendant had committed a burglary on the same day the kidnap, rape and homicide occurred." 185 Mont. at 332, 605 P.2d

at 1019. Thus, the Montana Supreme Court acknowledged that the unadjudicated offense served to deprive Coleman of the one mitigating factor the sentencing court found otherwise to exist and thereby eliminated the only consideration that, under the sentencing court's approach, could have overcome the aggravating factor and permitted Coleman's life to be spared.

Any doubt as to whether the judge improperly denied Coleman mitigation credit on the basis of an unadjudicated offense must be decided in favor of the defendant. For, as noted *supra*, even the "risk [of] the death penalty being imposed in spite of factors which may call for a less severe penalty . . . is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." *Lockett v. Ohio*, 438 U.S. at 605 (plurality).

The use of the unadjudicated, and wholly uncorroborated, offense here served to deprive Coleman of his only chance for leniency. On the basis of that offense the judge denied him the mitigation credit that he would otherwise have received as a result of his lack of a prior criminal record. Under the statute, this was tantamount to classifying Coleman as a defendant with a "significant history of prior criminal activity." Even more important, in light of the court's other rulings, it left Coleman without any statutory mitigating circumstance and made imposition of the death penalty mandatory.

(iii) Unconstitutionality of Relying on Unadjudicated Offenses

The majority relies on *Williams v. New York*, 338 U.S. 241 (1949), in support of its contention that the sentencer

in a capital punishment case may rely on uncharged and untried offenses. In that case, the majority tells us, "the Court upheld the trial court's consideration, in imposing the death sentence, of some thirty burglaries allegedly committed by the defendant, even though he had not been convicted of these crimes." Maj. Op. at 600 (citing *Williams v. New York*, 337 U.S. at 244).

In *Gardner*, however, the Supreme Court expressly rejected the approach underlying *Williams*. The court explained its reasons:

In 1949, when the *Williams* case was decided, no significant constitutional difference between the death penalty and lesser punishments for crime had been expressly recognized by this Court. At that time the Court assumed that after a defendant was convicted of a capital offense, like any other offense, a trial judge had complete discretion to impose any sentence within the limits prescribed by the legislature. As long as the judge stayed within those limits, his sentencing discretion was essentially unreviewable and the possibility of error was remote, if, indeed, it existed at all. In the intervening years there have been two constitutional developments which require us to scrutinize a State's capital-sentencing procedure more closely than was necessary in 1949.

430 U.S. at 357 (plurality). The two developments that the court was referring to were (a) the recognition that "death is a different kind of punishment from any other which may be imposed in this country" and (b) the acceptance of the notion "that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." *Id.* at 357, 358.

The objection to the sentencer's reliance on the alleged Roundup burglary is based on the due process

clause and rests, in great part, on the notion that capital punishment is a unique and an ultimate sentence. Thus, the majority's use of *Williams* as a basis for rejecting Coleman's claim is, in my view, not appropriate. As in *Gardner*, the "two constitutional developments . . . require us to scrutinize [the] state's capital sentencing procedure more closely than in 1949" when *Williams* was decided.

Because, as already mentioned, the Supreme Court has repeatedly held that capital sentencing is *sui generis*, the admissibility of evidence of unadjudicated crimes in ordinary sentencing hearings is not dispositive here. Compare *United States v. Hull*, 792 F.2d 941 (9th Cir. 1986) (per curiam) (imputed thefts properly relied upon in determining noncapital sentence).<sup>37</sup> We must decide as a matter of first impression whether unadjudicated offenses can play any role in the decision to impose the death penalty. In light of the strict due process requirements that the Supreme Court has imposed on capital sentencing, I believe that such offenses may not be so used.

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<sup>37</sup> Of course, even in noncapital cases, the sentencer must find that the underlying "facts provide sufficient indicia of reliability of the inference that [the defendant] committed [the imputed offense]." *United States v. Hull*, 792 F.2d at 943. See also *Brothers v. Dowdle*, 817 F.2d 1388, 1390 (9th Cir. 1987) ("the court must satisfy itself that the defendant in fact committed the acts in question"). In the present case, not even these more lenient noncapital standards could justify the sentencing judge's reliance on the Roundup burglary. At no point did the court "satisfy itself that the defendant in fact committed the acts in question." *Id.* The judge simply assumed that Nank's uncorroborated and dubious allegation was true and could be relied on as a basis for ordering Coleman's execution.

*Gardner* tells us that in death penalty cases, "consideration must be given to the quality, as well as the quantity, of the information on which the sentencing judge may rely." *Id.* at 359. In *Zant v. Stephens*, the Supreme Court held that the capital sentencer could rely upon evidence of prior criminal convictions. 462 U.S. at 886-87. The Supreme Court, noted, however, that the accuracy of all the evidence at issue was unchallenged and pointed out that reliance on a prior conviction that was "uncounselled" might require the setting aside of even a noncapital sentence. *Id.* at 886 and n.23. In my view, evidence of unadjudicated offenses is not of the quality required in capital sentencing and causes undue prejudice to the defendant. The use of such evidence runs afoul of the "fundamental principles of procedural fairness" that are applicable to capital sentencing proceedings. *Presnell v. Georgia*, 439 U.S. 14, 16 (1978). Moreover, given the constitutional significance that attaches to a capital defendant's criminal record or lack thereof – *Sumner v. Shuman*, 107 S. Ct. at 2721-22; *California v. Brown*, 107 S. Ct. at 839; *Eddings v. Oklahoma*, 455 U.S. at 110-12, *Lockett v. Ohio*, 438 U.S. at 604-05 (plurality); *Woodson v. North Carolina*, 428 U.S. at 303-04 (plurality); *Roberts (Stanislaus) v. Louisiana*, 428 U.S. at 333 (plurality) – we should not allow the sentencing authority to rely on unadjudicated offenses when assessing that factor.

The Supreme Court of Pennsylvania took a clear-cut and enlightened approach to the issue before us. Even before the spate of United States Supreme Court cases defining the constitutional restrictions on the imposition of the death penalty, the highest court of Pennsylvania had already concluded:



In a capital case where a man's life is at stake, it is imperative that the death penalty be imposed only on the most reliable evidence. Prior convictions of record, and constitutionally valid admissions and confessions of other crimes meet this standard of reliability; piecemeal testimony about other crimes for which [the defendant] has not yet been tried or convicted can never satisfy this standard.

*Commonwealth v. Hoss*, 445 Pa. 98, 118, 283 A.2d 58, 69 (1971). Since then other state courts have considered the issue and a majority, like Pennsylvania, have forbidden the use of unadjudicated offenses in capital sentencing. See, e.g., *State v. Bartholomew*, 101 Wash.2d 631, 633-40, 683 P.2d 1079, 1082-85 (1984) (admitting evidence of uncharged or unadjudicated criminal activity violates due process); *Scott v. State*, 297 Md. 235, 245-47, 465 A.2d 1126, 1135-36 (1983) (rejecting on state-statutory and federal constitutional grounds the use of evidence of unadjudicated offenses during capital sentencing); *State v. McCormick*, 272, 279-80, 397 N.E.2d 276, 279-81 (1979) (introducing, at the capital sentencing phase, evidence of an unrelated murder, for which defendant was neither tried nor convicted, violates due process); *Provence v. State*, 337 So.2d 783, 786 (Fla. 1976) (state statute intended to meet the requirements of *Furman* "excludes the possibility of considering mere arrests or accusations as factors in aggravation"). Only a minority of states, two in number, has adopted a contrary view. See *People v. Baldaras*, 41 Cal.3d 144, 204-05, 222 Cal. Rptr. 184, 219-220, 711 P.2d 480, 515-16 (Cal. 1985) (uncharged crimes may be used in deciding whether to impose the death penalty); *Milton v. State*, 599 S.W.2d 824, 827 (Tex. Crim. App. 1980) (upholding "use of unadjudicated offenses at the [capital] punishment phase"). However, in both minority states it

is required that the unadjudicated offense be proved "beyond a reasonable doubt". No court has previously held, as does the majority here, that an unadjudicated offense can be established by a lesser standard.

The states that have refused to permit use of unadjudicated offenses in capital cases have done so both in cases barring their use in order to establish the existence of an aggravating circumstance and cases precluding their use as a means of depriving the defendant of mitigation credit.<sup>38</sup> The two minority states that have permitted their use have done so in cases in which the prosecution sought to rely on them as aggravating circumstances. While, in my view, their use in either fashion is constitutionally impermissible, because of the difference in the allocation of the burden of proof their use to deprive a defendant of credit in mitigation is clearly far more egregious.

Because the majority holds that the defendant bears the burden of proof as to the existence of mitigating factors, the sentencing court's reliance upon an unadjudicated offense in the mitigation phase meant that Coleman

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<sup>38</sup> In *Scott v. State*, a case in which the unadjudicated offense was used in the latter manner, the Court of Appeals of Maryland reasoned in language remarkably pertinent here:

... the admission of [evidence of unadjudicated offenses] may well have resulted in the mitigating circumstance of the absence of prior convictions being outweighed or, in essence, "wiped out" or eliminated. Because this inadmissible evidence was significantly prejudicial to the accused, its admission constituted reversible error.

was required to prove by a preponderance of the evidence that he did not commit a crime. In the end the consequence of his failure to prove that he was not guilty of an unadjudicated offense was the death sentence. It is in all likelihood for this reason that no other court has heretofore approved of the use of a prior unadjudicated offense where its existence or nonexistence was, under the applicable state statute, relevant to a defendant's attempt to establish mitigating circumstances.

Only one circuit court decision, *Autry v. Estelle*, 706 F.2d 1394 (5th Cir. 1983), appears to lend any support to the use of unadjudicated offenses in capital cases. However, on close examination it is clear that even *Autry* supports Coleman's position rather than the state's. In *Autry*, the Fifth Circuit upheld the admission of evidence "of jail records reflecting that [the defendant] was in jail on a charge of felony theft and was released on the afternoon of the robbery [during which the capital offense took place]." *Id.* at 1404. See also *Milton v. Proccunier*, 744 F.2d 1091, 1097 (5th Cir. 1984); *Rault v. State of La.*, 772 F.2d 117, 135 n.32 (5th Cir. 1985) (dictum). However, the Fifth Circuit then emphasized the fact that "[t]he evidence was not used in an effort to prove that [the defendant] committed the extraneous offense." *Id.* at 1405. The court recognized but distinguished the state court decisions condemning the introduction of proof of extraneous offenses in the sentencing phase of capital case unless conviction had been obtained. *Id.* (citing *Provence v. State*, 337 So.2d 783 (Fla. 1976), cert. denied, 431 U.S. 969 (1977); *State v. Bartholomew*, 101 Wash. 2d 631, 654 P.2d 1170 (1982); *State v. McCormick*, 272 Ind. 272, 397 N.E.2d 276 (1979)). All the arguments relied upon by the

Fifth Circuit to distinguish these decisions are equally applicable to distinguish the present case:

Unlike the Texas statute, the death penalty statutes of Florida, Washington, and Indiana do not require a determination that the accused would commit criminal acts of violence that would constitute a continuing threat to society. Rather they require a determination that one or more particularized aggravating circumstances exists, including that the accused has previously committed other crimes or other murders. *When the effort is to prove that a defendant committed a particular crime on an earlier occasion, insisting in the capital case that such proof be only by a prior conviction may not be unreasonable.* The effort here, however, was not to prove that [the defendant] had committed theft or that he was a thief. Indeed, the jury already had before it two previous convictions for theft-type offenses.

*Autry*, 706 F.2d at 1406. (emphasis supplied). Whatever one might conclude about the validity of the *Autry* holding, it clearly has no relevance to cases expressly distinguished. Perhaps most important of all is the Fifth Circuit's concluding caveat:

We do not here open wide the door to proof of extraneous offenses at the sentencing hearing. To the contrary, we also are wary of their use, particularly in a capital case.

*Id.* at 1407. Where, as here, the only evidence of the unadjudicated offense is that offered by a codefendant seeking to escape capital punishment, and where that evidence was not even relevant to the issue of punishment under the statute in effect at the time it was offered, *see infra* section IV.A.3, that caveat seems particularly compelling.

## (iv) Notice

The sentencing judge's reliance on the alleged Roundup burglary also presents serious notice problems under the due process clause. Even though the presentence investigation report refers to the alleged burglary, the defense cannot be presumed to have known that the judge would rely on Nank's uncorroborated allegation to deny Coleman mitigation credit for his clean record. To the contrary, in the immediately preceding hearing the judge led Coleman to believe that the alleged burglary would not be relied upon and that he would get mitigation credit for having no prior convictions. During that hearing, the judge, upon filing the presentence investigation report, unequivocally declared: "The significant part of it relative to mitigating circumstances, is that the defendant has never been convicted of any felony prior to this charge."

The mention of the Roundup burglary in the decision that was distributed at the second hearing afforded Coleman no useful notice whatsoever. The majority's statement to the contrary is, to say the least, odd. Notice seconds before a hearing, let alone after the decision has been distributed, is grossly inadequate. The proceeding began immediately after the distribution of the sentencing court's decision. Coleman and his attorney may well not have learned that the judge intended to rely on the alleged Roundup burglary until after he read the sentence aloud. In any event, any comments they could have made after the decision was distributed would unquestionably have been futile. See *supra* discussion at subsection III.C.I.



In *Memphis Light, Gas & Water v. Craft*, the Supreme Court held that notice, in general, must "apprise the affected individual of, and permit adequate preparation for, an impending 'hearing'." 436 U.S. 1, 14 (1978) (footnote omitted). These principles become all the more compelling in capital sentencing hearings. For, as mentioned earlier, *see supra* section III.C.1., the constitution demands that defense counsel have the opportunity to participate meaningfully in such hearings. *See Gardner v. Florida*, 430 U.S. at 360 (plurality). The notice afforded in this case that the court would consider the unadjudicated crime certainly was not adequate and clearly did not give Coleman's counsel an opportunity to comment effectively. As in *Gardner*, we should conclude that defendant "was denied due process of law when the death sentence was imposed, at least in part, on the basis of information which he had no opportunity to deny or explain." 430 U.S. at 362 (plurality). *See also Skipper v. South Carolina*, 106 S. Ct. at 1671 n.1.; *id.* at 1674 (Powell, J., concurring in the judgment).

### C. Conclusion

In my view, the sentencing procedures were constitutionally inadequate and require that the death penalty be vacated. The sentencing judge deprived Coleman of his right to present oral argument regarding the sentence to be imposed, failed to comply with his constitutional obligation to listen to the defendant's contentions, and failed to consider Coleman's character and background. In addition, he based his decision in part on a constitutionally impermissible consideration and failed to afford the defendant adequate notice of a charge on which his



sentence was, in part, based. All of these constitutional errors, individually and collectively, require a reversal of Coleman's capital sentence.

#### IV. THE DEATH PENALTY STATUTE AND THE CRUEL AND UNUSUAL PUNISHMENT CLAIM

##### A. *The Death Penalty Statute*

##### 1. *Introduction*

Coleman challenges the death penalty statute under which he was resentenced both on its face and as applied to him. He claims that the statute is facially unconstitutional because it imposes on the defendant the burden of proof on the existence of mitigating circumstances and on whether mitigating circumstances outweigh aggravating circumstances. He also contends that both the due process and *ex post facto* clauses preclude his resentencing under a death penalty statute that was enacted only after he had been tried, convicted, and sentenced under an earlier statute. With one possible exception, it is clear that none of these questions has yet been resolved by the Supreme Court or any circuit court.

##### 2. *Burden of Proof on Mitigating Circumstances*

Coleman claims that the 1977 Montana statute under which he was sentenced to death violates the eighth and fourteenth amendments by imposing on the defendant the burden of proof on the existence of mitigating circumstances and on whether such circumstances are sufficiently substantial to warrant leniency.

The majority states that the 1977 death penalty statute, as interpreted in *Fitzpatrick v. State*, 638 P.2d 1002 (Mont. 1981), imposes on the defendant only the burden of production, not the burden of persuasion. Maj. op. at 572 n.5. However, that is not what *Fitzpatrick* says. In *Fitzpatrick*, the Montana Supreme Court decided that the 1977 death penalty statute imposes on the defendant both the burden of production *and* the burden of persuasion. The court's opinion first placed the burden of production on the defendant by requiring him "to bring forth the evidence pertinent to the question of mitigation." 638 P.2d at 1013. The opinion did not end at that point, however. The defendant claimed that, under the 1977 death penalty scheme, "he was required to prove that his life should be spared, because the burden rests on him to show mitigation." *Id.* The Montana Supreme Court responded unequivocally: "The statute undoubtedly places the burden on the defendant to show that his life should be spared. . . ." *Id.* Put another way, under the Montana statute, in order to prevail on the issue of capital punishment, the defendant must prove both the existence of mitigating circumstances and that the mitigating circumstances outweigh the aggravating circumstances, i.e., that they are sufficiently substantial to call for leniency. As stated in the dissent: "The majority [in *Fitzpatrick*] admits that the statute does shift the burden of persuasion, but holds that it is not unconstitutional." *Id.* at 1047 (Shea, J., dissenting).

My colleagues here also err in failing to recognize that Coleman's claim consists of two parts. First, Coleman complains that the statute unconstitutionally forces him

to prove, by a preponderance of the evidence, the existence of mitigating circumstances. Second, Coleman contends that the statute violates due process by placing on him the burden of proving that capital punishment is not the appropriate penalty – that the mitigating circumstances are sufficiently substantial to call for leniency. These two issues should be addressed separately. I will discuss them in reverse order.

The question the sentencing court is required to answer under the Montana statute – whether mitigating circumstances are sufficiently substantial to call for leniency – is similar in nature to that posed under a number of other states' statutes – whether the mitigating circumstances outweigh the aggravating ones. In both cases, the issue is which party should bear the burden of proof on the ultimate question – whether the facts and circumstances in the record before the court, properly construed and evaluated, warrant a decision for life or for death. Surprisingly, the Supreme Court has not yet decided which party should bear that burden, although some members have made it clear that in their view the Constitution requires that it be placed on the prosecution.<sup>39</sup> Equally odd, no circuit court has yet spoken

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<sup>39</sup> In the cases on which certiorari has been sought thus far, the state courts have not said, as did Montana's, that the burden rests on the defendant. Nevertheless, in his dissent from the denial of *certiorari* in one of those cases, *Thomas v. Maryland*, Justice Marshall, joined by Justice Brennan, addressed the underlying issue, saying: "To my mind, the Constitution requires that the State bear the burden of proving that a death sentence is appropriate in a given case." 470 U.S.

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definitively on the question.<sup>40</sup>

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1088 (1985) (Marshall, J., dissenting from denial of *cert.*). See also *Stebbing v. Maryland*, 469 U.S. 900, 906-07 (1984) (Marshall, J., dissenting from denial of *cert.*). In *Thomas*, even though the Maryland Court of Appeals had not decided which party bore the burden of persuasion, the death penalty statute required that the capital sentencer determine whether mitigating circumstances outweighed aggravating circumstances. Justice Marshall concluded that the language implicitly imposed on the defendant the burden of proving that his life should be spared. He said that because the Maryland statute placed on the defendant the burden of proving "the ultimate question" Thomas' death sentence should be vacated. 470 U.S. at 1088. In subsequent cases, Justice Marshall argued that the language of the statute impermissibly shifted the risk of nonpersuasion even though the Maryland Court of Appeals by then had held that the statute does not impose the burden of proof on the defendant. *Calhoun v. Maryland*, 107 S. Ct. 1339 (1987) (Marshall, J., dissenting from denial of *cert.*); *Huffington v. Maryland*, 106 S. Ct. 3315 (1986) (Marshall, J., dissenting from denial of *cert.*). In *Gacy v. Illinois*, Justice Marshall argued that a statute which "impos[ed] on the defendant the burden of adducing mitigating evidence 'sufficient' to 'preclude imposition' of the death penalty" unconstitutionally "plac[ed] on the defendant the burden of proving that death is not appropriate in his particular case." 105 S. Ct. 1410 (1985), (Marshall, J., dissenting from denial of *cert.*). It is worth noting that the language of the Illinois statute in *Gacy* is similar to that of the statute challenged here, but in that case the Illinois courts, unlike Montana's, had not made it clear that the burden falls on the defendant. See also *Jones v. Illinois*, 464 U.S. 920 (1983) (Marshall, J., dissenting from denial of *cert.*).

<sup>40</sup> The Fifth and the Eleventh Circuits have decided cases involving claims by defendants that a death penalty statute

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I believe that, in capital cases the Constitution requires the prosecution to bear the risk of nonpersuasion on the ultimate issue of life or death – on the question whether leniency is called for, whether the mitigating circumstances in a particular case are sufficiently substantial, whether they outweigh the aggravating circumstances. Because of the extraordinary nature of the death penalty, there is an overwhelming “need for reliability in the determination that death is the appropriate punishment in a specific case.” *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality) (footnote omitted). In *Summer v. Shuman*, the Supreme Court recently underscored once again “the heightened reliability demanded by the Eighth Amendment in the determination whether the death penalty is appropriate in a particular case.” 107 S.

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unconstitutionally placed on them the burden of persuasion on whether the mitigating circumstances outweighed the aggravating ones. *Songer v. Wainwright*, 733 F.2d 788, 792 (11th Cir. 1984), *cert. denied*, U.S. 1133 (1985); *Gray v. Lucas*, 677 F.2d 1086, 1106 (5th Cir. 1982), *cert. denied* 461 U.S. 910 (1983). In both cases the courts held that the statute invoked did not place the burden on the defendant. While both suggest that the defendant may be required to produce evidence in mitigation, neither suggests that the burden of persuasion on the weighing of aggravating and mitigating circumstances may be shifted to the defendant. The two Eleventh Circuit cases cited by the majority do not stand for that proposition either. Both address the entirely different question whether the prosecution should bear a beyond-a-reasonable-doubt burden on the appropriateness of the death penalty. *Foster v. Strickland*, 707 F.2d 1339, 1345 (11th Cir. 1983), *cert. denied*, 466 U.S. 993 (1984); *Ford v. Strickland*, 696 F.2d 804, 817-18 (*en banc*) (*per curiam*) (11th Cir. 1983), *cert. denied*, 464 U.S. 865 (1983).



Ct. at 2720 (1987) (citing *Gregg v. Georgia*, 428 U.S. at 189-95 (opinion of Stewart, Powell, and Stevens, J.J.); *Proffitt v. Florida*, 428 U.S. at 252-53 (same); *Jurek v. Texas*, 428 U.S. at 271-72 (same); *Woodson v. North Carolina*, 428 U.S. at 303-05 (plurality opinion); *Roberts (Stanislaus) v. Louisiana*, 428 U.S. at 333-35 (plurality opinion)). We therefore must go "to extraordinary measures to ensure that the prisoner sentenced to be executed is afforded process that will guarantee, as much as is humanly possible, that the sentence is not imposed out of whim, passion, prejudice, or mistake." *Eddings v. Oklahoma*, 455 U.S. 104, 117-18 (1976) (O'Connor, J., concurring).

Under these exacting standards, in my view, the state may not constitutionally impose on defendants the burden of proof on the ultimate issue in the capital sentencing proceeding. The Constitution requires "state courts to consider all relevant mitigating evidence and weigh it against the evidence of the aggravating circumstances." *Eddings v. Oklahoma*, 455 U.S. at 117. This comparative weighing of aggravating and mitigating factors is the most important determination courts make in deciding whether a defendant shall live or die. In fact it may be the most important decision courts make - period. Certainly, the sentencer should not resolve so crucial a question against the defendant unless the prosecution has carried the burden of persuasion. It is important to note here that the Supreme Court has characterized the decision as to whether mitigating circumstances are such as to warrant imposition of a life rather than a death sentence as the type of "line drawing that is commonly required of a factfinder in a lawsuit." *Proffitt v. Florida*, 428 U.S. 242, 257 (1976). See also *Jurek v. Texas*, 428 U.S. 262, 275-76



(1976). The question, thus, is one as to which the proper allocation of the burden of persuasion is of great importance. See generally *Strickland v. Washington*, 466 U.S. 668, 686 (1984) ("A capital sentencing proceeding resembles a trial in its adversarial format and in the existence of standards for decision. . . ."); *Spaziano v. Florida*, 468 U.S. 447, 483 (1984) (Stevens, J., concurring in part and dissenting in part) ("In many respects capital sentencing resembles a trial on the question of guilt, involving as it does a prescribed burden of proof of given elements through the adversarial process.") Here, the burden was placed on the wrong party. I believe that the eighth and fourteenth amendments require that the defendant's life be spared when the evidence or the arguments on mitigation and aggravation are in balance. The Constitution does not allow the risk of error to fall on the individual, on the side of death. Rather that risk must be born [sic] by the state, by those urging execution.

These principles become even more critical when statutes such as Montana's *require* the sentencing judge to impose the death penalty if one of a number of aggravating circumstances is present and the mitigating circumstances are not sufficiently substantial to call for leniency. Under those circumstances the sentencer does not have the ultimate discretion to determine independently the appropriateness of the death penalty.<sup>41</sup> Its evaluation of

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<sup>41</sup> Other states allow the sentencing authority to impose a life sentence even if it finds that aggravating circumstances outweigh the mitigating factors. For instance, under the Mississippi death penalty statute involved in the Fifth Circuit case

the relative weight of the mitigating and aggravating circumstances is the sole determinant of whether the death penalty will be imposed. Since the outcome may be determined by which party has the burden of proof, there can be little doubt where that burden must lie. See *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (plurality).

The majority opinion purports to establish the facial validity of the statute by citing wholly inapplicable Supreme Court cases – *Proffitt v. Florida*, 428 U.S. 242 (1976) and *Jurek v. Texas*, 428 U.S. 262 (1976) – cases which uphold death penalty statutes that, according to the majority, do not impose a burden of persuasion on the prosecution.

Even were the majority correct, however, the argument misses the mark. For the majority does not suggest that any of the statutes involved in these cases places the burden, as Montana does, on the defendant. There is, of course, a significant difference between simply allowing the court to resolve an issue as to which no allocation of the burden has been made and placing the burden on the defendant. In *Proffitt*, the Court considered the facial validity of a death penalty statute that did not specify which party bore the burden of persuasion as to mitigating factors. There is no mention in *Proffitt* of where the burden rests under state law. Nor is there any suggestion

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that discusses burden allocation in capital sentencing, see *supra* note 39, "even if the jury finds that the aggravating circumstances outweigh the mitigating circumstances, it is not required to impose the death penalty." *Gray v. Lucas*, 677 F.2d at 1106.

in the opinion that the normal burden of proof in making such judgments should be, or was, reversed under the Florida statute. In any event, the petitioner did not complain that the burden was imposed on him, and the Supreme Court, unsurprisingly, did not discuss the issue.

The majority's reliance on *Jurek* is equally misplaced. In *Jurek*, the state required the jury to answer in the affirmative three questions before imposing the death penalty. The second question was: "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society . . . ." 428 U.S. at 269. Texas has interpreted the statute as requiring the jury to consider mitigating circumstances under this second question. Under the statute the jury must find "that the State has proved beyond a reasonable doubt that the answer to each of the three questions is yes". *Id.* Thus, the Texas statute, as a practical matter, imposed on the prosecution, albeit indirectly, the burden of proving beyond a reasonable doubt that the mitigating factors were not sufficient to exclude defendant from the category of individuals that constituted a continuing threat to society. Moreover, in *Jurek*, as in *Proffitt*, the Court carefully noted the similarity between the jury's ordinary task as a factfinder and its task in answering the questions it was required to answer under the Texas capital punishment statute. 428 U.S. at 275-76 (plurality). It seems likely from this observation that the Court would not have permitted Texas to shift the burden of proof to the defendant. The majority consequently errs when it says that in *Jurek* the statute did not impose on the state the burden to prove the absence of mitigating circumstances. Maj. op. at 573. Finally, in *Jurek*, as in

*Proffitt*, the burden of proof issue was neither raised by the petitioner nor decided by the court.

The majority also invokes *Harris v. Pulley*, 692 F.2d 1189 (9th Cir. 1982)(per curiam), *rev'd on other grounds*, 465 U.S. 37 (1984), to support the facial adequacy of the statute. However, *Harris* decided the different issue whether "a beyond-a-reasonable-doubt standard is required when determining whether a death penalty should be imposed." *Id.* at 1195. In *Harris* we held that a death penalty statute was not unconstitutional simply because it did not impose on the prosecution the burden of proving *beyond a reasonable doubt* that the aggravating circumstances outweighed the mitigating ones. The holding in *Harris* does not address or resolve the question presented here: whether the prosecution or defense has the burden of persuasion on whether mitigating circumstances outweigh aggravating circumstances.<sup>42</sup> Moreover,

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<sup>42</sup> *Harris* contains the following dictum:

If the Supreme Court had intended for the burden in death-penalty cases to vary from the standard burden in all other criminal sentencing, it would have said so in one of the many modern cases dealing with the death penalty.

*Harris v. Pulley*, 692 F.2d at 1195 (per curiam). The question presented in *Harris* was whether in capital sentencing, unlike in ordinary criminal sentencing, the prosecution had to bear a beyond-a-reasonable-doubt burden of proof. The statement quoted above not only is entirely suppositious but constitutes patent dictum that sweeps far too broadly. The Supreme Court has assiduously avoided making unnecessary pronouncements in death penalty cases and has carefully limited its discussions to issues properly before it. Any guess, by way of dictum, as to why the Supreme Court has not said something when the issue has not been properly before it is just that – a guess by way of dictum.

in *Harris*, as in *Proffitt* and *Jurek*, the defendant did not allege that the risk was unconstitutionally imposed on him and there is no mention in the opinion of where the risk of non-persuasion rests as a matter of state law.

Coleman's second claim regarding the burden of proof issue is that the 1977 death penalty statute unconstitutionally imposed on him the burden of persuasion on the *existence* of mitigating circumstances. In *Lockett v. Ohio*, the Supreme Court failed to reach the question of the constitutionality of "requir[ing] defendants to bear the risk of nonpersuasion as to the existence of mitigating circumstances in capital cases." 438 U.S. at 609 n.16.<sup>43</sup>

I believe that the special need for reliability in determining that the death penalty is appropriate requires that the burden of persuasion on the *existence* of mitigating circumstances rest on the prosecution. Consideration of

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<sup>43</sup> In the noncapital context, *Patterson v. New York* holds that the state may require a defendant to carry the burden of persuasion on mitigating circumstances presented as affirmative defenses as long as such circumstances do not serve to negate any of the elements of the criminal offense. 432 U.S. 197, 206-07 (1977). See also *Martin v. Ohio*, 107 S. Ct. 1098 (1987) (not unconstitutional to impose on the defendant the burden of proving affirmative defenses, including self-defense). If the state may impose on a defendant the burden of persuasion on mitigating circumstances presented as affirmative defenses, it certainly may, in a noncapital case, impose the same burden on the existence of mitigating factors during the sentencing proceeding. However, as discussed *supra*, the Supreme Court has repeatedly held that capital punishment is qualitatively different from other sentences and, therefore, must meet stricter constitutional standards.



mitigating circumstances "is a 'constitutionally indispensable part of the process of inflicting the penalty of death.' " *California v. Brown*, 107 S. Ct. 837, 839 (1987)(quoting *Woodson v. North Carolina*, 428 U.S. at 304 (plurality)). The existence of a mitigation circumstance may very well be the determining factor in deciding whether or not to impose capital punishment. The Constitution, accordingly, requires that when the evidence as to the existence of a mitigating circumstance is in equipoise, we decide the question in favor of the capital defendant.<sup>44</sup>

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<sup>44</sup> In his dissent from the Court's denial of certiorari in *Stebbing v. Maryland*, Justice Marshall set forth a compelling argument as to the unconstitutionality of placing on defendants the burden of persuasion on the existence of mitigating circumstances:

[T]he mitigating factors set out in the statute are not matters of historical fact – they are matters of legal and moral judgment. These factors do not "exist," and thus, unlike matters of historical fact, they are not easily proved or disproved. Each one rests on evidence that easily might influence the conclusion that death is proper, even if that evidence does not conclusively *prove* the statutory mitigating factor. . . .As a result, the sentencer would be prevented from considering any of the evidence adduced in an effort to meet the burden of proof, because the statute permits consideration only of the factors proved by a preponderance of the evidence. To preclude the sentencer from considering such potentially influential evidence – as does the statute by denying any weight to evidence if the defendant does not convince the jury that a factor "exists" by a preponderance of the evidence – is to bar, as a matter of law, consideration of all mitigating evidence and influence and thus to violate *Lockett* and *Eddings*. Such a result can only

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Whatever the general rule, in this case the burden was allocated in a manner that is patently unconstitutional. Because the state placed the burden on Coleman to prove the absence of a criminal record, he was required to prove that he had not committed the unadjudicated offense testified to by Nank, i.e., the alleged Roundup burglary.<sup>45</sup> On account of that burglary, Coleman was denied mitigation credit for his spotless criminal record. Thereafter, because the judge found no other mitigating circumstances, imposition of the death penalty was mandatory. Placing the burden on Coleman with respect to the Roundup burglary was wholly inconsistent with the presumption of innocence which lies at the heart of our system of criminal justice.

In sum, I believe that the Constitution prohibits states from imposing on defendants the burden of persuasion on the existence of mitigating circumstances as well as on the issue whether the mitigating circumstances outweigh the aggravating ones. In my view, both burdens must be placed on the prosecution. Certainly that is the

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enhance "the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." [*Lockett v. Ohio*,] 438 U.S. at 605 [(plurality)].

469 U.S. 900, 902-03 (1984)(Marshall J., dissenting from denial of cert.)(emphasis in original).

<sup>45</sup> See *supra* section III.C.2.b(iii) for discussion of unconstitutionality of considering unadjudicated offenses in capital sentencing proceedings.

case where the effect of placing the burden on the defendant is to require him to prove his innocence of an uncharged and unadjudicated offense. Certainly, also, that is the case where the determination of the mitigation-aggravation issue mandates the answer to the ultimate question – life or death.

3. *Retroactive Application of the 1977 Death Penalty Statute*

Montana's Supreme Court held, in *Coleman I*, 177 Mont. 1, 579 P.2d at 741-42, that the mandatory death penalty statute under which Coleman was convicted and originally sentenced violated the eighth and fourteenth amendments of the federal constitution. The court found the statute inconsistent with the rulings in *Woodson v. North Carolina*, 428 U.S. 280 (1976), *Coker v. Georgia*, 433 U.S. 584 (1977), and *Roberts (Harry) v. Louisiana*, 431 U.S. 633 (1977). Coleman was then resentenced to death in 1978 under a new statute enacted in 1977, two years after his conviction and original sentencing. He contends that in these circumstances the state's retroactive application of the new statute violates the due process and *ex post facto* clauses of the Constitution. I believe we are required to reverse on the basis of the due process clause.

Again, the majority opinion glosses over an issue the Supreme Court has not previously decided. The Court has never considered whether a subsequently-passed death penalty statute may be applied to defendants *who have previously been tried, convicted, and sentenced* under unconstitutional statutes. Equally important, as far as I am aware every court that has considered the issue has

refused to permit the imposition of capital punishment on defendants under such circumstances.<sup>46</sup>

Montana insists that *Dobbert v. Florida*, 432 U.S. 282 (1977), legitimates the resentencing of Coleman under its 1977 death penalty statute. While *Dobbert* may arguably preclude Coleman from objecting to his resentencing on *ex post facto* grounds, it in no way validates his due process claim.<sup>47</sup> In fact, there is language in *Dobbert* that

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<sup>46</sup> The courts of at least seven states have so held. California, *People v. Harvey*, 76 Cal. App.3d 441, 445-49, 142 Cal. Rptr. 887, 889-92 (1978) (on double jeopardy grounds); Idaho, *State v. Lindquist*, 99 Idaho 766, 589 P.2d 101 (1979) (on *ex post facto* grounds); Nevada, *Meller v. State*, 94 Nev. 408, 581 P.2d 3 (1978) (grounds not stated but *Dobbert* distinguished); South Carolina, *State v. Rodgers*, 270 S.C. 285, 292-93, 242 S.E.2d 215, 217-18 (1978) (on due process grounds) and even Florida, the source of the *Dobbert* decision itself, *State v. Lee*, 340 So.2d 474 (Fla. 1976) (on equal protection grounds). In these cases the state attempted to resentence people, like Coleman, who had already been tried and previously sentenced to death but whose sentences had been set aside. At least two states have gone even further and have refused to apply subsequently passed capital statutes in the case of defendants who were first convicted and sentenced to death under unconstitutional statutes, but were *retried* after constitutional capital punishment statutes had been enacted. Illinois, *People v. Hill*, 78 Ill.2d 465, 401 N.E.2d 517 (1980) (on statutory grounds); Pennsylvania, *Commonwealth v. Story*, 497 Pa. 273, 440 A.2d 488 (1981) (on equal protection and due process grounds).

<sup>47</sup> In *Knapp v. Cardwell*, 667 F.2d 1253 (9th Cir. 1982) *cert. denied*, 459 U.S. 1055 (1982), we decided that defendants tried and sentenced under an Arizona death penalty statute which was unconstitutional as initially *interpreted* by the Arizona

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strongly supports Coleman's contention that the due process clause is applicable here.

In *Dobbert*, the petitioner was convicted and sentenced under the Florida death penalty statute in effect *at the time of his trial* rather than the one in effect when he committed the crime. The petitioner there argued that his conviction and sentence violated the *ex post facto* clause.

The *Dobbert* majority rejected the claim. The Court held that a defendant who had not yet been tried could be prosecuted and sentenced under a death penalty statute adopted after he had committed the crime as long as the death penalty statute in effect at the time of the offense provided adequate notice of the severity of the

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Supreme Court had no *ex post facto* claim upon being resentenced under a subsequent and constitutional *reinterpretation* of the same statute. We expressly limited our discussion to the *ex post facto* clause. We concluded that "[t]he *Dobbert* opinion makes it clear that [the] distinction [between defendants tried and sentenced before the new scheme was in force and those tried and sentenced afterwards has no] *ex post facto* implications." *Id.* at 1262. "Thus," we held, "no *ex post facto* problems arise even with respect to [the former category of defendants]." *Id.* at 1263. We did not decide, however, whether the *due process* clause imposed any constraints on a state's attempts to resentence, under a *new death penalty statute*, defendants who were tried and originally sentenced under an unconstitutional death penalty statute.

In view of the conclusion I reach under the due process clause, I find it unnecessary to express any view as to whether the *ex post facto* provision also precludes the imposition of the death penalty on Coleman.

offense and the punishment that would be meted out for its commission.

Respondent now urges us to go well beyond *Dobbert*. Montana asks that we allow it to apply its new death penalty statute retroactively not only to individuals who have not yet been tried, but also to individuals who have already been subjected to trial, convicted, and sentenced under the former statute. The majority in *Dobbert* expressly refused to approve such an all-inclusive application of a subsequently enacted statute and, as stated *supra*, every court that has considered the question since *Dobbert* has refused to do so (with the exception, of course, of the Montana Supreme Court in the case before us).

The operating assumption in *Dobbert* was that newly enacted statutes could *not* be applied retroactively to defendants previously tried and sentenced under the prior unconstitutional statute – i.e., to individuals like Coleman. The dissent articulated that assumption:

Of the hundreds of prisoners on death row at the time of [*Furman v. Georgia*, 408 U.S. 238 (1972)], none was resentenced to death. . . . [O]ur state courts and state legislatures uniformly acted on the assumption that none of them could be executed pursuant to a subsequently enacted statute.

432 U.S. at 309 (Stevens, J., dissenting). The dissenters took the circumstances under which Coleman has now been resentenced to death as a paradigm of unconstitutionality and tried to show that *Dobbert's* situation was not significantly different.

The majority rejected the comparison that the dissenters were trying to make but not the underlying



assumption. In fact, then-Justice Rehnquist, speaking for the Court, painstakingly distinguished the circumstances presented by cases such as the one before us from the circumstances in *Dobbert*. He did so in dealing with Dobbert's contention that the equal protection clause required that Florida treat him in the same way it treated individuals who had been tried, convicted, and sentenced under the old statute - i.e., those who were in precisely the same position as Coleman. Florida had resentenced all those individuals to life imprisonment. *Anderson v. State*, 267 So.2d 8 (Fla. 1972); *In re Baker*, 267 So.2d 331 (Fla. 1972). The *Dobbert* court emphatically stated that Dobbert was

not similarly situated to those whose sentences were commuted. He was neither tried nor sentenced prior to *Furman*, as were they, and the only effect of the former statute was to provide sufficient warning of the gravity Florida attached to first-degree murder so as to make the application of this new statute to him consistent with the *Ex Post Facto* Clause of the United States Constitution.

432 U.S. at 301. The Supreme Court itself thus distinguished *Dobbert* from our case. But the majority did not simply distinguish the Coleman situation in order to answer Dobbert's equal protection claim. The language of the opinion suggests strongly that applying the death penalty to those previously sentenced under the former statute would have violated their constitutional rights.

*Dobbert* says,

Florida obviously had to draw the line at some point between those whose cases had progressed sufficiently far in the legal process as to be governed solely by the old statute, with the concomitant unconstitutionality of



its death penalty provision, and *those whose cases involved acts which could properly subject them to punishment under the new statute*. There is nothing irrational about Florida's decision to relegate petitioner to the latter class, since the new statute was in effect at the time of his trial and sentence.

*Id.* (emphasis supplied). According to the Court, Florida properly decided that *Dobbert's* case – which had not yet reached trial, let alone sentencing, when the new statute was enacted – had not progressed far enough in the legal process to be exempt from the new statute. Nevertheless, the implication in *Dobbert* is clear: After a case has reached a certain point in the legal process under the old statute, the state may not order the defendant's execution under a newly enacted statute.

Coleman's case is surely one that "had progressed sufficiently far enough in the legal process as to be governed solely by the old statute." Indeed, Coleman had already been tried, convicted, and sentenced when the new statute was enacted. Moreover, he had already unsuccessfully filed a motion for a new trial, obtained a stay of execution, and appealed to the highest court of the state when the Montana legislature passed the new death penalty statute.

What is perhaps most significant about *Dobbert* is the majority's statement that Florida was required to divide its death penalty cases into two categories – those which could be processed under the new statute, with death as a possible penalty, and those which had progressed too far for such treatment. Any line-drawing by Montana to define a category of cases which would be "governed

solely by the old statute, with the concomitant unconstitutionality of its death penalty provision," necessarily would place Coleman's case in that category. The only other significant group of cases that had progressed as far as Coleman's would be that group of cases in which the defendant had received a noncapital sentence initially under the old statute. With respect to those cases, however, no line-drawing would be required since the defendants could not, consistent with the Double Jeopardy Clause, have been resentenced to death under the new statute in any event. See *Arizona v. Rumsey*, 467 U.S. 203, 209 (1984) ("[T]he Double Jeopardy Clause prohibits the State from resentencing the defendant to death after the sentencer has in effect acquitted the defendant of that penalty.").<sup>48</sup>

In *Dobbert*, then, "the only effect of the former statute was to provide sufficient warning of the gravity Florida attached to first-degree murder . . . " *Dobbert v. Florida*, 432 U.S. at 301. Here, the former statute had been relied on by Coleman, and applied to him, in every possible respect (save his actual execution). The state's abrupt invocation of the new statute against Coleman, after he had been originally tried and sentenced under a different

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<sup>48</sup> There could also conceivably be a few cases which had been previously reversed for reasons other than the unconstitutionality of the death penalty and in which the defendants were awaiting retrial or resentencing. No relevant distinction can be made for due process purposes between those cases and Coleman's. Similarly, there might have been one or two cases in which the death sentence had already been upheld on appeal. Here, too, however, the distinction is irrelevant.

procedure, contravenes fundamental notions of fair play and violates the due process clause.

The sentencing of Coleman under a death penalty statute that was passed after his trial, conviction, and original sentencing constitutes the type of arbitrary state action that the due process clause was intended to invalidate. Retroactive application of the statute to cases like Coleman's would tend to create instability and uncertainty. It would make it impossible for capital defendants to know at the time of trial the nature of the death penalty statutory scheme under which they may ultimately be sentenced. If capital defendants may be sentenced under laws that have not been passed at [sic] of the time of their trials, they must decide on trial strategy and tactics without knowing with any certainty what factors will be taken into account at the time a sentencing court makes the final decision whether to impose the death penalty.

The retroactive application of a new death penalty statute upon *resentencing* is particularly unfair where, as is the case here, the old and new statute may cause defendants to make different decisions regarding trial tactics or strategy. In defending Coleman, counsel necessarily relied on the capital punishment statute as it then existed. For example, decisions concerning the evidence Coleman would offer at trial, the evidence he would challenge, and his appellate strategy were all necessarily affected by the fact that Montana had a mandatory death penalty statute for the offense on which he was being tried. Thus, all that mattered to Coleman and his counsel during the trial was the ultimate jury determination of guilt or innocence on the capital charge. The degree of

culpability was irrelevant. Yet under the subsequently enacted statute the degree of culpability is highly relevant to the sentencing decision. Thus different strategies and tactics would clearly be appropriate under the former and current statutes.<sup>49</sup>

Coleman has provided another very clear example of the type of prejudice that resulted from the change in law. At the time of trial, under the mandatory death penalty statute then in effect, Coleman had no reason to be concerned about evidence pertaining to mitigating or aggravating circumstances. Thus, he had no reason, at the time of trial, to challenge or rebut Nank's story about the alleged Roundup burglary, other than simply to deny it. When the 1977 statute was later applied to Coleman's resentencing, that testimony became critical. *See supra* subsection III.C.2.b(ii).

The majority seems to suggest that for Coleman's retroactivity claim to succeed, he would have to show that the fact of the Roundup burglary would not have been disclosed at the trial or sentencing *but for* Coleman's cross-examination of Nank at trial. *See maj. op.* at 565-566.<sup>50</sup> The majority offers no justification for impos-

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<sup>49</sup> The sentencing judge in fact included in his findings a reference to the degree of Coleman's culpability. The reference was based entirely on brief portions of Nank's testimony that Coleman had no particular reason to challenge or to attach special significance to during trial.

<sup>50</sup> The Roundup burglary was mentioned in the presentence report, but only because of Nank's testimony.

The majority considers this retroactivity claim only in terms of the *ex post facto* clause and not in the context, of due

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ing such a burden on Coleman. Instead, it stresses that Coleman did have a motive to scrutinize Nank's testimony since Nank and Coleman testified to conflicting accounts of the events of the day the murder occurred and that Coleman also had ample opportunity to refute Nank's charges. *Id.* at 566. My colleagues seem to imply that there was no constitutional violation because Coleman suffered no substantial harm as a result of the retroactive application of the statute.

Yet for the court to require that Coleman carry the burden of proving that the evidence of the burglary would not have been introduced but for his questioning of Nank is contrary to a fundamental principle of constitutional law: when there has been constitutional error, the burden to show that it was harmless falls on "someone other than the person prejudiced by it." *Chapman v. California*, 386 U.S. 18, 24 (1967). As the Court explained in *Chapman*, "the original common-law harmless-error rule put the burden on the beneficiary of the error either to prove that there was no injury or to suffer a reversal of his erroneously obtained judgment." *Id.* (footnote omitted). Here, the state, not Coleman, is benefitting from the retroactive application of the 1977 statute, and Coleman has shown actual prejudice as a result of Nank's testimony – the denial of his statutory credit in mitigation

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process. Its arguments are, however, equally applicable, or for that matter, equally inapplicable to a due process claim. The majority offers no suggestion that it believes the evidentiary burden would be any different for claims based upon the *ex post facto* clause and those based upon due process.



that might have spared his life. It is the prosecution's burden therefore to show beyond a reasonable doubt that evidence of the burglary would have come in even had Coleman not invited Nank's testimony. *See id.* The prosecution made no effort to meet this burden.

#### 4. *Summation*

The 1977 death penalty statute under which Montana has sentenced Coleman to be hanged is unconstitutional both on its face and as applied to him. The statute impermissibly imposes on the defendant the burden of persuasion as to the existence of mitigating circumstances and the burden of showing that the mitigating circumstances are sufficiently substantial to mandate leniency. It also compelled Coleman in this case to prove that he did not commit an unadjudicated offense. Accordingly, the statute on its face and as applied violates the due process clause of the Constitution. Furthermore, the retroactive application of the statute to a defendant who had already been tried, convicted, and sentenced prior to its enactment independently violates that constitutional provision. Every court that has previously considered the issue has so held. In the case of Coleman, the retroactive application of the statute was particularly unfair since his death sentence was based in significant part on testimony that he had no reason to believe was of any significance when it was introduced under the former statute at the time of trial. For all these reasons, Coleman's death penalty should be vacated.



## B. Cruel and Unusual Punishment

### 1. *Arbitrary and Extraneous Factors*

As discussed in section II, Coleman's participation in the Harstad murder was not significantly different from that of his white codefendant Nank. With respect to the relevant aspects of their character, background, and criminal record, Coleman was clearly a more deserving candidate for leniency than Nank. While in my view, there can be little question that the prosecution's conduct during plea bargaining raises a strong inference of racial discrimination, for purposes of this part of the analysis I will assume *arguendo* that race played no part in the state's decision-making process. Even under that assumption, however, imposition of the death penalty on Coleman was arbitrary, and reversal of that sentence is required by the eighth and fourteenth amendments.

The Supreme Court has stated that "it is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." *Gardner v. Florida*, 430 U.S. 349, 558 (1977) (plurality). The decision must be individualized; it must rest on the "relevant facets of the character and record of the individual offender [and on] the circumstances of the particular offense." *Woodson v. North Carolina*, 428 U.S. at 304; see *Sumner v. Shuman*, 107 S. Ct. at 2723 ("[A] departure from the individualized capital-sentencing doctrine is not justified and cannot be reconciled with the demands of the Eighth and Fourteenth Amendments."); *Booth v. Maryland*, 107 S. Ct. 2529, 2532 (1987) ("a jury must make an 'individualized determination' of whether the defendant in

question should be executed, based on 'the character of the individual and the circumstances of the crime' " (quoting *Zant v. Stephens*, 462 U.S. 862, 879 (1983) (emphasis in original)); *Roberts (Stanislaus) v. Louisiana*, 428 U.S. 325, 333 (1976) (plurality) ("Lack of focus on the circumstances of the particular offense and the character and propensities of the offender" constitutes "constitutional vice."); *Jurek v. Texas*, 428 U.S. 262, 274 (1976) (plurality) (Sentencing authority must concentrate on "the particularized circumstances of the individual offense and the individual offender before it can impose a sentence of death."); *Gregg v. Georgia*, 428 U.S. 153, 199 (1976) (plurality) (Sentencing authority must "focus on the particularized circumstances of the crime and of the defendant.")

The Supreme Court recently vacated a death sentence as violative of the eighth amendment where the sentencer was permitted to consider an extraneous factor, a Victim's Impact Statement. The Court said:

While [we have] never said that the defendant's record, characteristics, and the circumstances of the crime are the *only* permissible sentencing considerations, a state statute that requires consideration of other factors must be scrutinized to ensure that the evidence has some bearing on the defendant's "personal responsibility and moral guilt." *Enmund v. Florida*, 458 U.S. 782, 801 (1982).

*Booth v. Maryland*, 107 S. Ct. 2529, 2532-33 (1987) (emphasis in original). As *Booth* makes clear, the Constitution does not permit the state to impose the death penalty on the basis of considerations unrelated to the "defendant's 'personal responsibility and moral guilt.'" *Id.* Permitting the introduction of extraneous factors into

the sentencing process "creates an unacceptable risk that the capital sentencing decision will be made in an arbitrary and capricious manner." *Id.* In *Sumner v. Shuman*, the Court reinforced this point by quoting in a footnote the following passage from Justice O'Connor's concurrence in *California v. Brown*:

"*Lockett* and *Eddings* reflect the belief that punishment should be directly related to the personal culpability of the criminal defendant. Thus, the sentence imposed at the penalty stage should reflect a reasoned *moral* response to the defendant's background, character and crime."

107 S. Ct. at 2723 n.5 (quoting *California v. Brown*, 107 S. Ct. at 839 (O'Connor, J., concurring) (emphasis in original)).

Where two persons are jointly responsible for a crime, we should carefully examine any claim that a decision to execute one and spare the other's life is based on improper considerations.<sup>51</sup> Here, the decision that Coleman should be executed rather than afforded a non-capital sentence was based in large part on considerations unrelated to his record, character and background, or to

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<sup>51</sup> This proposition is far different from saying that the state must justify its conduct on the basis of a general proportionality review. Compare *Pulley v. Harris*, 465 U.S. 37 (1984). General statistics may not adequately reflect the various individual judgments properly made as part of the exercise of prosecutorial discretion. On the other hand, unequal treatment of capital codefendants may occur regardless of what any general proportionality study may show with respect to other cases in general and the individual judgments are readily identifiable and reviewable.

the degree of his culpability. I reach this conclusion in two ways. One is by examining the reasons given by the state throughout the process by which it determined that Coleman should be executed. The other is by comparing the facts and circumstances relating to Coleman's case with those that apply with respect to Nank's.

The state offered several reasons for its insistence on pursuing capital proceedings in Coleman's case. Most of the state's reasons related to the alleged unreliability or lack of voluntariness that might attach to any guilty plea by Coleman. The state argued that his plea would lack a factual basis, that it would not be voluntary because he secretly still believed he was innocent, that the plea would be subject to being set aside because he could later claim he was motivated solely by his fear of the death penalty or by his belief that he could not get a fair, nondiscriminatory trial. The state also complained that a guilty plea would be unreliable because Coleman had undertaken a sodium amytal test prior to pleading, because defense counsel had claimed to be incompetent, and because Coleman had previously requested and been granted a change of venue. Assuming *arguendo* that these contentions would have justified the state's rejection of Coleman's plea and its insistence that he proceed to a jury trial, under no circumstances could any of them serve as a basis for a decision by the state that Coleman should die. That a plea might be unreliable or involuntary, and even that a trial was required in order to prove guilt, is not a proper reason for ordering a defendant's execution. Such considerations are "wholly unrelated to the blameworthiness of a particular defendant." See *Booth v. Maryland*, 107 S. Ct. at 2534.

In addition to its "major" reasons for seeking to try Coleman on capital charges, the state mentioned two additional contentions. It weakly suggested at one point that Coleman was the more culpable defendant. It did not press that suggestion in the pretrial proceedings and does not contend in its brief before us that Coleman was more culpable than Nank. Moreover, my independent review of the record persuades me that the contention was wholly unmeritorious.<sup>52</sup>

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<sup>52</sup> In his sentencing decision, the Judge said that Coleman was the dominating influence and the decision maker. He offered no explanation for this rather surprising statement. The court's conclusion is wholly at odds with the strong comments it made both during the pretrial proceedings and at the close of the prosecution's case. After listening to Nank's testimony, the judge told the prosecutor that he took the defendant's motion for judgment of acquittal very seriously and that the prosecution's case was not at all persuasive except on the issue of "this black boy'[s] . . . opportunity". More important, the Court's conclusion is not supported by any fair reading of the record, even when viewing all of the testimony in the light most favorable to the prosecution. Nank was clearly an equal participant, and was at the least equally culpable. The few brief and equivocal comments by Nank that could lend any support to a contrary view are wholly unpersuasive. Nank's statements not only are inadequate to support the judge's comments, but his testimony in this regard is highly suspect. Nank, of course, had every reason to attempt to make Coleman appear to be more blameworthy. Aside from Nank's comments, there is no evidence whatsoever, circumstantial or otherwise, that in any way provides the slightest support for the court's statement. Under these circumstances, I do not believe that, in a capital punishment case, we should give the court's statement undue weight. As the Supreme Court has declared, "we cannot avoid our responsibilities by permitting ourselves to be 'completely

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The state also advanced a more substantial contention during the plea bargain proceedings, one that raises an important issue with respect to capital punishment. The state claimed that Nank had confessed to the crime and entered his plea some time before Coleman expressed his willingness to do so. Although the fact that one defendant begins to cooperate first may justify leniency, and thus disparate sentences, in noncapital cases, I believe that a decision to execute a person may not constitutionally be based on that circumstance. Again we are faced with an issue of first impression and again we must proceed from the premise that capital punishment is singularly different from other forms of punishment. The fact that a defendant offers to plead at a later date than his codefendant bears no relation whatsoever to the criminal conduct involved or to the other aggravating and mitigating circumstances that the court may properly consider. Consequently, in my opinion, if the state decides whom to execute on the basis of which person began to cooperate first, it imposes the death penalty in

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bound by state court determination of any issue essential to decision of a claim of federal right, else federal law could be frustrated by distorted fact finding.' " *Haynes v. State of Washington*, 373 U.S. 503, 515-16 (1963) (quoting *Stein v. New York*, 346 U.S. 156, 181 (1953)). Moreover, for the reasons set forth in the text, I believe that the state's decision to execute Coleman was based in substantial part on factors that are " 'irrelevant to the sentencing process' ", *Baldwin v. Alabama*, 472 U.S. 372, 382 (1985) (quoting *Zant v. Stephens*, 462 U.S. 862, 885 (1983)), and thus constitutionally impermissible.



an arbitrary manner that violates both the eighth and fourteenth amendments.<sup>53</sup>

Admittedly, there are valid reasons for offering leniency to defendants who are willing to cooperate with law-enforcement authorities. Were such a bargaining tool not available, the state would be unable to prosecute many perpetrators of serious crimes whom it is now able to convict. Moreover, I believe that the technique must be available with respect to capital as well as noncapital offenses. The difference, I suggest, is only that in capital cases, when an equally culpable or more culpable defendant is to be spared execution, then the life of any codefendant of that offender must also be spared unless the prosecution can demonstrate that there are particular factors relating to the codefendant's background, history, or character that would justify a decision to impose the death sentence on him alone.

The Supreme Court said in *Spaziano v. Florida*: "If a State has determined that death should be an available penalty for certain crimes, then it must administer that penalty in a way that can properly distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not." 468 U.S. at 460. See also *Booth v. Maryland*, 107 S. Ct. at 2534. When the decision to

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<sup>53</sup> When, after the court distributed its written decision, the prosecutor was permitted to make some remarks, he devoted most of his comments to a review of the pretrial issues, including the fact that Nank was the first to offer to plead. There was of course little reason for him to make an argument as to the appropriateness of the sentence, since the court had already advised the parties of its decision and its reasons.

execute Coleman is viewed in the context of the life sentence received by Nank, it is evident that the basis on which the state has selected Coleman for death is an improper one.

A civilized society could not rationally conclude that death is an appropriate punishment for Coleman but not for Nank because Nank confessed first and cooperated earlier, because the state was required to conduct a trial in Coleman's case in order to build a record, or because the prosecutors were uncertain as to the voluntariness or reliability of his plea. Those factors do not serve to distinguish "those individuals for whom death is an appropriate sanction [from] those for whom it is not." *Spaziano v. Florida*, 468 U.S. at 460. Thus, the mere fact that Coleman was forced to trial on a capital charge and convicted of that offense while Nank was permitted to escape trial on that count by pleading guilty to other offenses cannot – without more – serve as a basis for a judicial determination that one man shall live and the other shall die. There is no "more" present in this case. *See supra* note 53. In my opinion, Coleman's death sentence should be vacated as contrary to the eighth and fourteenth amendments.

## 2. *Unreliability of the Evidence*

One final point deserves serious attention. There is much merit to Justices Shea and Morrison's pleas to the federal courts to interdict capital punishment in Coleman's case because of the unreliability of the evidence on which both the conviction and the decision to execute were based. There was little, if any, corroboration of Nank's version of the crime. Only the possible existence

of negroid pubic hairs in the car is potentially inconsistent with Coleman's story, and the expert testimony on that point was far from conclusive. Nank is a convicted felon. He made numerous contradictory statements regarding how the crime occurred, and he had every motive to lie, not the least being his desire to escape being hanged. Unquestionably, it is Nank's testimony on which both the conviction and the sentencing decision must rest. In my view, his testimony lacks the degree of certainty that we should require before a capital sentence may be imposed.

The Supreme Court has made it clear that there is a difference in the degree of certainty we require to uphold a conviction or a noncapital sentence and that which we require to send a man to his death. Objective reliability of the evidence, and not just a jury's decision as to its reliability, is a prerequisite to the imposition of capital punishment. As Justice Stewart wrote for the Court with respect to a closely related question:

This conclusion rests squarely on the predicate that the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for *reliability* in the determination that death is the appropriate punishment in a specific case.

*Woodson v. North Carolina*, 428 U.S. at 305 (plurality) (emphasis supplied). Similarly, as the Court said in *Gardner*, "[c]onsideration must be given to the quality as well as the quantity of the information on which the sentencing judge may rely." 430 U.S. at 359 (plurality). I fully

agree with Justices Shea and Morrison that the standard of reliability that is required in capital punishment cases is not met here, and that, accordingly, the sentence of death violates both the eighth and fourteenth amendments.

## V. CONCLUSION

I have examined only some of the most compelling claims presented by Coleman. I have divided them into three categories: the pretrial proceedings, the sentencing hearing, and the capital punishment statute along with the eighth amendment issues. I express no view on the other points Coleman raises. The pretrial proceedings claims require, at the least, that a hearing be conducted on the habeas petition. The claims pertaining to the sentencing hearing call for vacation of the sentence and a new hearing on the appropriateness of the sentence to be imposed. The claims relating to the unconstitutionality of the statute, on its face and as applied, as well as the eighth amendment claims, also require vacation of the sentence but would additionally preclude reimposition of the death penalty.

The record in this case is replete with evidence of serious constitutional violations, including discriminatory treatment on the basis of race. Some of these violations are afforded only the most cursory treatment in the majority opinion. There can be little doubt that in its eagerness to ensure Coleman's execution Montana failed to afford him the fundamental rights guaranteed to all persons by our Constitution. Whatever one's view of the death penalty in general, it is clear that it cannot be

imposed in an arbitrary and lawless manner. Yet that is precisely what Montana did here. I dissent, in the firm hope and expectation that the majority decision will not long survive.

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APPENDIX C

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
BILLINGS DIVISION

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DEWEY E. COLEMAN,	)	CV-81-272-BLG
	)	
Petitioner,	)	ORDER
	)	
-vs-	)	(Filed Aug. 8,
	)	1985)
HENRY RISLEY, as Warden of	)	
Montana State Prison;	)	
	)	
and	)	
	)	
MICHAEL T. GREELY, as Attor-	)	
ney General for the State of	)	
Montana,	)	
	)	
Respondents.	)	

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Pursuant to the Memorandum Opinion issued this day in the above-entitled case,

IT IS ORDERED that the respondents' motion for summary judgment is granted and the petitioner's motion for summary judgment is denied.

IT IS FURTHER ORDERED that petitioner's petition for a writ of habeas corpus is denied.

The Clerk is directed forthwith to notify counsel [sic] for the respective parties of the making of this order.

Done and dated this 8th day of August, 1985.

/s/ James F. Battin  
Chief Judge



IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
BILLINGS DIVISION

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DEWEY E. COLEMAN,	)	CV-81-272-BLG
	)	
Petitioner,	)	MEMORANDUM
	)	OPINION
-vs-	)	
HENRY RISLEY, as Warden of	)	(Filed August 8,
Montana State Prison;	)	1985)
	)	
and	)	
	)	
MICHAEL T. GREELY, as Attor-	)	
ney General for the State of	)	
Montana,	)	
	)	
Respondents.	)	

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This habeas corpus petition by Dewey E. Coleman is before the Court on cross-motions for summary judgment. The Court has reviewed many documents, briefs, exhibits, transcripts, and reported judicial opinions. The petition presents thirty-seven issues for this Court to resolve. For the reasons stated below, the respondents' motion for summary judgment is granted on all thirty-seven issues, and the petitioner's motion for summary judgment is denied on all thirty-seven issues.

*FACTS AND PROCEDURE*

Petitioner's petition seeks relief under 28 U.S.C. § 2254. Petitioner is challenging the conviction and sentences imposed on him in state district court for the

offenses of aggravated kidnapping, deliberate homicide, and sexual intercourse without consent. The facts and circumstances of petitioner's crime are set forth in *State v. Coleman*, 177 Mont. 1, 579 P.2d 732 (1978).

On November 14, 1975, following a jury trial in state district court, petitioner was found guilty of aggravated kidnapping, deliberate homicide, and sexual intercourse without consent. The district court sentenced petitioner to: 100 years for the deliberate homicide; 40 years for sexual intercourse without consent; and death for the aggravated kidnapping.

On appeal, the Montana Supreme Court affirmed petitioner's convictions. *State v. Coleman*, 177 Mont. 1, 579 P.2d 732 (1978). The Court found, however, that the death penalty statute under which petitioner was sentenced was unconstitutional. The Court also found that the 40-year sentence for sexual intercourse without consent was improper. The case was remanded to the state district court for resentencing.

The district court, using a newly enacted death penalty statute, resentenced petitioner to death for the aggravated kidnapping, and resentenced petitioner to 20 years for the sexual intercourse without consent. Following petitioner's resentencing, he again appealed to the Montana Supreme Court. His sentences were affirmed on June 20, 1979, but a rehearing was granted to consider the effect of the United States Supreme Court case of *Sandstrom v. Montana*, 442 U.S. 510 (1979). The Montana Supreme Court's final decision upholding petitioner's conviction and sentences was issued on December 19, 1979, and the United States Supreme Court declined to

review certain alleged errors in that opinion. *State v. Coleman*, 185 Mont. 299, 605 P.2d 1000 (1979), *cert. denied*, 446 U.S. 970 (1980).

Petitioner then sought review in the Sentence Review Division of the Montana Supreme Court and was refused. The Montana Supreme Court denied petitioner's subsequent application for a writ of supervisory control in an order dated March 21, 1980. This prompted the filing of a second petition for a writ of certiorari before the United States Supreme Court. The writ was denied. *Coleman v. Sentence Review Division of The Supreme Court of Montana*, *cert. denied*, 449 U.S. 893 (1980).

On October 24, 1980, petitioner filed in the district court a petition for post-conviction relief and a motion that the district court judge recuse himself as the presiding judge in the proceedings concerning the petition for post-conviction relief. On November 21, 1980, the district court judge denied the motion to recuse. On February 18, 1981, the petition for post-conviction relief was denied.

Petitioner appealed the denial of his petition for post-conviction relief to the Montana Supreme Court which affirmed the district court on August 28, 1981. Rehearing was denied. *Coleman v. State*, \_\_\_ Mont. \_\_\_, 633 P.2d 624 (1981).

Petitioner filed his petition for a writ of habeas corpus in this Court on November 19, 1981. This Court directed the petitioner to file a petition in the Montana Supreme Court for the purpose of resolving any issues arising out of a state court hearing conducted on July 2 and 3, 1975, concerning the withdrawal of petitioner's original court-appointed counsel. The Montana Supreme

Court denied the petition. *Coleman v. Risley*, \_\_\_ Mont. \_\_\_, 663 P.2d 1154 (1983). Petitioner's state remedies have now been fully exhausted, and the petition is ripe for review by this Court.

### DISCUSSION

The petition presents thirty-seven issues grouped into ten main categories for resolution by this Court. The Court will address them accordingly.

#### *The Arrest*

1. Petitioner claims he was arrested in his home without a warrant, without probable cause, and not in the state where the crimes were committed. Petitioner claims that his arrest violated his Fourth Amendment rights and that the alleged fruits of this allegedly unlawful arrest, the rope and his co-defendant's confession, should have been suppressed.

Petitioner bases this claim on *Payton v. New York*, 445 U.S. 573 (1980), which held that the Fourth Amendment prohibits police from arresting a suspect in his home without a warrant or exigent circumstances. However, *United States v. Johnson*, 457 U.S. 537 (1982), held that the *Payton* ruling was to be applied retroactively only to those convictions "that were not yet final at the time the decision was rendered." *Johnson*, 457 U.S. at 562. The *Payton* decision was rendered in 1980; petitioner's conviction was final prior to the *Payton* decision.

Petitioner's claim also fails for the reason that the rope was seized pursuant to a search warrant, not incident to an arrest. Additionally, petitioner has no standing to challenge alleged violation of his codefendant's constitutional rights, *Alderman v. United States*, 394 U.S. 165 (1969), and therefore cannot challenge Nank's confession.

2. Petitioner claims that evidence (the rope and hair samples) taken from the car was illegally obtained and used with no hearing allowed thereon. Respondents admit that a car belonging to petitioner and Nank was searched without petitioner's consent and the rope and hair samples were obtained. The search was conducted with the consent of Nank, however.

It is well settled that a co-owner has authority to permit the search of a jointly-held possession, and any incriminating evidence found may be used against the nonconsenting co-owner. *United States v. Matlock*, 415 U.S. 172 (1974); *Frazer v. Cupp*, 394 U.S. 731 (1969); *United States v. Wilson*, 447 F.2d 1 (9th Cir. 1971). Thus, the evidence was obtained legally, and petitioner's claims are meritless.

### *The Information*

3. Petitioner claims that the trial court, *sua sponte*, amended the information in such a way as to invoke the possibility that a death sentence could be imposed.

The kidnapping count of the original information did not contain an allegation that petitioner had caused the death of the victim. The prosecutor moved the district court to amend the original information to include, *inter*

*alia*, in the aggravated kidnapping count, the allegation that petitioner had caused the death of the victim. At the hearing on the motion to amend the information, the state district court judge stated as follows: "I'm going to deny the motion to amend, except that I think there should perhaps be inserted on Count 2 'resulting in the death of Peggy Lee Harstad,' or 'such conduct resulting in the death.' " The judge then amended the information by adding the following language in his own handwriting: "Resulting in the death of Peggy Lee Harstad."

Petitioner claims that this amendment of the information is one of substance and that prior to this amendment he was not subject to the death penalty. This Court disagrees with petitioner's claim and adopts the reasoning of the Montana Supreme Court's holding on this issue.

The Montana Supreme Court had the following to say about petitioner's claim:

The amendment was one of form. Defendant knew from the very beginning the death penalty was going to be sought. Prior to the amendment to Count 2, the death penalty, upon a conviction, could have been sought under either Count 1 or Count 2. . . . Furthermore, the record indicates that defendant was not surprised the death penalty was being sought. He objected to the amendment in the lower court, but he did not ask for any continuance as the result of it. He clearly knew prior to the amendment that the state was seeking the death penalty.

*State v. Coleman*, 177 Mont. 1, 23, 579 P.2d 732, 745-46 (1978). Petitioner asserts that death penalty cases are different, that special care must be taken when courts are reviewing death penalty cases. While petitioner's assertion is undoubtedly true (as evidenced by the lengthy



judicial history of petitioner's case), it does not mean that common sense should be abandoned. Petitioner cannot show any legal error or prejudice resulting from the amendment of the information.

4. Petitioner claims that double jeopardy bars his conviction for both deliberate homicide and aggravated kidnapping. The assertion is that petitioner is being punished twice for the same offense – the death of Peggy Lee Harstad.

Where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not. *Blockburger v. United States*, 284 U.S. 299, 304 (1932). To convict petitioner on Count 1 of the information, the prosecution had to prove the defendant (1) purposefully and knowingly (2) caused the death of another human being (3) while committing the felonies of kidnapping and (4) sexual intercourse without consent. To convict the petitioner on Count 2 of the information the prosecution had to prove the defendant (1) knowingly and purposely (2) without lawful authority (3) restrained another person by holding her in a place of isolation and by using physical force (4) to facilitate the commission of sexual intercourse without consent and (5) for the purpose of inflicting bodily injury on and terrorizing the victim. The offenses of deliberate homicide and aggravated kidnapping are separate and distinct offenses and each requires proof of elements the other does not. Therefore, defendant may be convicted and sentenced for both Count 1 and Count 2 of the

information without violating the double jeopardy prohibition. *Williams v. Oklahoma*, 358 U.S. 576 (1959).

### *Pre-Trial Proceedings*

5. Petitioner claims that, because he is black, he was denied the same plea bargaining opportunity as that afforded his white co-defendant. Petitioner argues that the only difference between him and Nank was the color of their skin. Such is not the case. Nank confessed to the crime shortly after his arrest and cooperated with law enforcement authorities. Petitioner maintained his innocence.

A defendant may plead guilty while maintaining his innocence, especially to avoid a death sentence. *North Carolina v. Alford*, 400 U.S. 25 (1970). However, neither the trial court nor the prosecution are required to accept a guilty plea under such circumstances. The acceptance of a guilty plea is within the discretion of the court. The petitioner's claim that he was treated differently because he is black is nothing more than idle speculation unsubstantiated by any facts.

6. Petitioner claims that the jury was not selected from a fair cross-section of the community.

Three days before petitioner's trial, he filed a challenge to the jury panel, claiming that it was not drawn in accordance with the jury selection statutes. After a hearing, the district court dismissed the jury panel. The court then ordered a new panel of 60 jurors to be drawn and summoned to appear for trial three days later.

The names of 200 prospective jurors were drawn. The clerk of court then telephoned the prospective jurors to see if they would be available for trial three days later. Sixty-one of those called replied they would be available.

Petitioner argues that the method used in selecting the jury denied him his right to a fair and impartial jury panel. He argues that the jury panel did not represent a cross-section of the community as most of the jurors came from the west side of Billings, Montana. Petitioner argues that the west side of Billings is more affluent than the area as a whole and therefore fewer minorities and persons with low incomes live there.

There is no constitutional requirement that a jury pool be a statistical mirror of the community. *Hoyt v. Florida*, 368 U.S. 57 (1961); *United States v. Greene*, 489 F.2d 1145 (D.C. Cir. 1973). Mere geographical imbalance, without a showing of a systematic attempt to exclude any class of persons, does not violate the Sixth Amendment. *United States v. Test*, 550 F.2d 577 (10th Cir. 1976); *Williams v. Baker*, 399 F.2d 681 (10th Cir. 1968). Petitioner does not claim, nor can he show, that there was a systematic attempt to exclude any class of persons. Petitioner's claim must, therefore, fail.

### *The Trial*

7. Petitioner claims that there was no jury participation as to his death sentence. This argument is precluded by recent Supreme Court and Ninth Circuit cases. The Sixth Amendment does not require jury participation in sentencing. *Spaziano v. Florida*, \_\_\_ U.S. \_\_\_, 104 S.Ct. 3154

(1984); *Adamson v. Ricketts*, 758 F.2d 441, 450 (9th Cir. 1985).

8. Petitioner claims that his constitutional right to remain silent was violated. Over petitioner's objection, the state trial court allowed the prosecution to introduce Exhibit 60 which was a waiver of rights form signed by petitioner and taken by a Boise, Idaho, detective. This form advised petitioner of his Miranda rights, and he acknowledged this by signing the form. Petitioner did not give any statement or recite any facts relating to the case. Petitioner claims that by introducing this waiver of rights form that he had signed, in light of the fact that he did not make a statement, the prosecution made an unconstitutional comment on petitioner's silence.

This Court agrees with the holding of the Montana Supreme Court on this issue. The Montana Supreme Court found no error in the admission of this exhibit because it was not used to comment on petitioner's silence, but rather to aid the jury in understanding the events that occurred in Boise, Idaho, and to support the testimony of the Boise detectives as to the date and time of arrest, and that petitioner was informed of his constitutional rights. *State v. Coleman*, 177 Mont. 1, 35, 579 P.2d 732, 752 (1978).

9. Petitioner claims that he was not allowed to challenge Nank's competency. Petitioner confuses competency with credibility. Competency is a matter to be determined by the trial judge. *State v. Coleman*, 177 Mont. 1, 27, 579 P.2d 732, 748 (1978). In this case, the state district court judge had received a confidential report from the acting director of Warms Springs State Hospital

concerning Nank's mental competency. The judge made a decision to let Nank testify.

It was the jury's job to determine whether Nank's testimony was credible. The petitioner was given the opportunity to cross-examine Nank. The jury believed Nank, not petitioner. Petitioner's claim essentially boils down to the fact that he does not like what the jury decided.

10. Petitioner claims that his cross-examination of the FBI expert who testified about hair samples, was unreasonably limited. The FBI expert testified on direct examination by the prosecution that he had identified hairs taken from the rear seat of the victim's car as negroid pubic hairs similar to pubic hair samples taken from petitioner. The expert also testified that the only way of identifying or comparing hair was by the use of a comparison microscope, which was the method he used.

In chambers, petitioner submitted certain proposed exhibits which were enlarged photographs of microscopic slides of hair samples. Petitioner proposed to cross-examine the expert using these photographs to see if he could identify them. The expert stated, *in camera*, that the photographs were of insufficient resolution to identify them and that they looked like a "big black log." Moreover, the expert stated that when a hair examiner looks at hair samples under a comparison microscope he turns the hairs and views them side by side so as to get a three-dimensional view of the particular characteristics. This cannot be done with a photograph.

The trial court disallowed the cross-examination with photographs, and properly so. The matter of permitting

the experiments, tests, and demonstrations is one addressed to the sound discretion of the trial court. *State v. Coleman*, 177 Mont. 1, 27, 579 P.2d 732, 747 (1978); *State v. Thompson*, 164 Mont. 415, 524 P.2d 1115 (1974). This Court finds no abuse of that discretion here.

11. Petitioner claims that cumulative trial errors provide legitimate questions as to the validity of his death sentence. Petitioner lists the following as errors occurring during his trial:

1. An FBI witness was permitted to testify that petitioner was evasive during questioning in Sheridan, Wyoming.

2. An FBI fingerprint expert was allowed to testify on re-direct examination beyond the scope of cross-examination. (The question to which petitioner objected concerned the date on which the FBI laboratory received certain fingerprint cards.)

3. Hearsay testimony was allowed when witness Makin testified as to where he was told certain hairs came from.

Each of these allegations was reviewed by the Montana Supreme Court and found to be insubstantial. *State v. Coleman*, 177 Mont. 1, 30, 579 P.2d 732, 749 (1978). This Court agrees. If there was any error, it was harmless error. The defendant is entitled to a fair trial, not a perfect one. *Burton v. United States*, 391 U.S. 123, 135 (1968).

#### *Proof as to Guilt*

12. Petitioner claims that Nank's testimony was not corroborated and all the corroborating evidence equally



corroborated petitioner's innocence. This matter of state law was ruled on by the Montana Supreme Court in *State v. Coleman*, 177 Mont. 1, 28, 579 P.2d 732, 748 (1978). The Court held that the following evidence was sufficient to corroborate Nank's testimony: the crack in petitioner's motorcycle helmet; a hair of the victim was found on the rope belonging to petitioner; the petitioner's fingerprints on the victim's car and in her purse; the negroid pubic hairs similar to petitioner's and the negroid head hair found in the victim's car; and the evidence that petitioner and Nank were seen together on the same road and at approximately the same time that the victim disappeared. This Court finds no error in the Supreme Court's ruling.

13. The petitioner claims that aggravated kidnapping was not proved as the Montana Supreme Court found that the petitioner had not inflicted bodily injury on the victim. This claim is utter nonsense.

The Montana Supreme Court found that there was insufficient evidence to find that petitioner inflicted bodily injury on the victim in the course of committing sexual intercourse without consent. This is not the same as saying that there was no bodily injury during the kidnapping. After all, the victim was killed.

#### *The Instructions Given The Jury*

14. The petitioner claims that the jury was instructed that the required criminal mental state could be inferred from the commision [sic] of a homicide. This claim is meritless.

The jury was instructed as follows:

If you find that the defendant Dewey Eugene Coleman committed a homicide and no circumstances of mitigation, excuse or justification appear, you may infer that the homicide was committed knowingly or purposely.

This instruction is a permissive inference. It is not like the mandatory *Sandstrom* instruction. It did not shift the burden of proof to petitioner, and it did not conflict with petitioner's presumption of innocence.

15. Petitioner claims that the instructions did not require proof of an intent to kill. Specifically, petitioner objects to the instruction defining the word "knowingly." Mont. Code Ann. § 45-5-101 defines criminal homicide as follows:

A person commits the offense of criminal homicide if he purposely, knowingly, or negligently causes the death of another human being.

Mont. Code Ann. § 45-2-101(33) defines "knowingly" as follows:

A person acts knowingly with respect to conduct or to a circumstance described by a statute defining an offense when he is aware of his conduct or that the circumstance exists. A person acts knowingly with respect to the result of conduct described by a statute defining an offense when he is aware that it is highly probable that such result will be caused by his conduct. When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if the person is aware of the high probability of its existence. Equivalent terms such as "knowingly" or "with knowledge" have the same meaning.

The state trial court used the above definition as an instruction. Petitioner claims that this definition does not

comport with constitutional requirements of criminal intent in that it violates the rule requiring a finding beyond reasonable doubt. However, as the Montana Supreme Court held, the jury was not called upon to determine "high probability" in place of "reasonable doubt;" rather, it was called upon to determine the existence of defendant's awareness, beyond a reasonable doubt, that there is a high probability that the result of his conduct makes his conduct criminal. *State v. Coleman*, 185 Mont. 200, 400, 605 P.2d 1000, 1055 (1979). The instruction was not an unpermissible presumption, and did not shift the burden of proof of any element of the crime onto the defendant.

16. The petitioner claims certain jury instruction phrased in the disjunctive permitted conviction by a less than unanimous jury verdict. This is clearly not a federal constitutional claim, and, therefore, is not reviewable by a federal court on a petition for habeas corpus. The United States Constitution does not guarantee a unanimous verdict in state criminal trials. *Apodaca v. Oregon*, 406 U.S. 404 (1972); *Johnson v. Louisiana*, 406 U.S. 356 (1972). Therefore, even if this Court agreed with petitioner, which it does not, this Court would have no jurisdiction to review this issue.

### *The Death Sentence*

17. Petitioner claims that his counsel was not permitted to present argument on the death penalty. This contention is without merit. The Montana Supreme Court had the following to say on this issue:

The district court issued an order dated June 2, 1978, clearly indicating a sentencing hearing was to be held on June 14, 1978, in accordance with §§ 95-2206.6 through 95-2206.11, R.C.M. 1947, now §§ 46-18-306 through -310, M.C.A. Those sections indicate what a sentencing court must consider in imposing the death penalty, including specifically that defendant or his counsel be allowed to present argument against the death penalty.

Therefore, by the June 2, 1978, order the defendant and his counsel were on notice of the proposed content of that hearing. However, at the sentencing hearing, defendant did not present any evidence of mitigating circumstances other than the presentence report. No statement against the death penalty was made other than to suggest certain procedures to test its constitutional validity before it was in fact imposed. Defendant had his opportunity to speak and did not avail himself of it. Finally, the district court order of July 31, 1978, denying defendant's petition for rehearing indicates the defendant also did not take advantage of the district court's offer to accept proposed findings and conclusions from the parties with respect to the sentence. Thus defendant and his counsel had at least two opportunities to submit argument to the court regarding the death penalty prior to the July 10, 1978, hearing, but did not do so.

*State v. Coleman*, 185 Mont. 299, 328-29. 605 F.2d 1000, 1018 (1979).

It is obvious that the petitioner and his counsel were given the required opportunity to present argument against the imposition of the death penalty.

18. Petitioner claims that a new death penalty statute was applied retroactively. This is a question of state law (petitioner's constitutional *ex post facto* claims are

addressed in Issue No. 31), and, as such, the Montana Supreme Court's holding is final. State courts interpret state statutes. *Wainright v. Stone*, 414 U.S. 21 (1973). The Montana Supreme Court determined that the state district court did not violate state law. *State v. Coleman*, 185 Mont. 299, 324. 605 P.2d 1000, 1015 (1979).

19. Petitioner claims that the state district court failed to properly consider mitigating circumstances in deciding on the sentence. Mont. Code Ann. § 46-18-303 enumerates the aggravating factors that a sentencing judge is to consider in deciding whether to impose the death penalty. Section 46-18-303 reads as follows:

Aggravating circumstances are any of the following:

...

7. The offense was aggravating [sic] kidnapping which resulted in the death of the victim.

Mont. Code Ann. § 46-18-304 enumerates the mitigating factors that a sentencing judge is to consider in deciding whether to impose the death penalty. Section 46-18-304 reads as follows:

Mitigating circumstances are any of the following:

- (1) The defendant has no significant history of prior criminal activity.

...

- (8) Any other fact exists in mitigation of penalty.

Mont. Code Ann. § 46-18-305 describes the effect of the aggravating and mitigating circumstances. Section 46-18-305 reads as follows:

In determining whether to impose a sentence of death or imprisonment, the court shall take into

account the aggravating and mitigating circumstances enumerated in 46-18-303 and 46-18-304 and shall impose a sentence of death if it finds one or more of the aggravating circumstances and finds that there are no mitigating circumstances sufficiently substantial to call for leniency.

The Supreme Court of Montana described the petitioner's crime as follows:

The evidence . . . established that the defendant had been a deliberate, voluntary participant in the kidnapping and subsequent rape and murder of the victim. The evidence further established that the death of the victim occurred after a sexual assault, not in a moment of passion, but over a period of time with the defendant first bludgeoning, then attempting to strangle, then finally drowning the victim in an effort to effectuate a deliberate decision to kill Peggy Harstad.

*State v. Coleman*, 185 Mont. 299, 332, 605 P.2d 1000, 1019 (1979). Considering the brutality of the crime, it was not error for the trial judge to decide that the defendant's lack of a criminal record was not sufficiently substantial to call for leniency.

20. Petitioner claims he was denied sentence review. Once again the petitioner has mistakenly included a matter of state law in his petition for habeas corpus.

This claim arises because the Sentence Review Division of the Montana Supreme Court refused to review petitioner's death sentence. The reason the review was denied was that there was a specific Montana statute (Mont. Code Ann. §§ 46-18-307 to -310) which automatically required the Montana Supreme Court, not the Sentence Review Division, to review petitioner's death sentence. The order of appeal is from the Review Division



to the Montana Supreme Court. It would make no sense to have the Sentence Review Division consider the sentence after the Montana Supreme Court had done so.

In any event, this is a matter of state law and involves no federal constitutional right. State courts interpret state statutes, *Wainright v. Stone*, 414 U.S. 21 (1973), and the Montana Supreme Court has ruled that the proper procedure was used in the review of petitioner's death sentence. *State v. Coleman*, 185 Mont. 299, 605 P.2d 1000 (1979).

21. Petitioner claims that factors not in the record were considered in the decision to sentence petitioner to death. This claim essentially amounts to speculation on the petitioner's part that the sentencing judge improperly considered factors such as the results of a truth serum test taken by petitioner.

There is no reason to think that the sentencing judge went beyond on the record [sic] in deciding what sentence the petitioner should receive. The sentencing judge set forth in writing the reasons he sentenced petitioner to death, and those "Findings, Conclusions, Judgment and Order" dated July 10, 1978, are sufficient.

22 and 23. Petitioner claims that he was sentenced to death under a mandatory death penalty which limits the judge's discretion to consider mitigating factors. In fact, the statutes under which petitioner was sentenced, Mont. Code Ann. §§ 46-18-301 to 310 (1977), clearly require the consideration and weighing of mitigating factors in the face of aggravating factors. As a result, the law permits, but does not mandate, the imposition of the death penalty. In regard to mitigating factors, the statute expressly

directs the Court to consider "any other fact that exists in mitigation of the penalty." Mont. Code Ann. § 46-18-304(8) (1977).

It is clear that the death penalty statutes under which petitioner was sentenced to death are constitutionally valid. *Profitt* [sic] *v. Florida*, 428 U.S. 242 (1976); *Gregg v. Georgia*, 428 U.S. 153 (1976); *Knapp v. Cardwell*, 667 F.2d 1253 (9th Cir. 1982). Petitioner's claims Nos. 22 and 23 are meritless.

24. Petitioner claims that the Montana death penalty statutes place the burden of proof on him to establish mitigating circumstances to save his life. Petitioner is correct. However, this procedure is constitutional. See *Richmond v. Cardwell*, 450 F.Supp. 519, 594-95 (D. Ariz. 1978). The prosecution has the initial burden to establish beyond a reasonable doubt the existence of an aggravating factor. It then becomes the burden of the defendant to establish evidence of mitigation.

25. Petitioner claims that his death sentence was arbitrary, capricious, and whimsical. As this Court noted in the *McKenzie* case, the arbitrariness and capriciousness condemned in *Furman v. Georgia*, 408 U.S. 238 (1972), are conclusively removed from the death penalty proceeding if the state adheres to a properly drawn death penalty. See *Spinkellink v. Wainwright*, 578 F.2d 582 (5th Cir. 1978), cert. denied sub nom 440 U.S. 976 (1979). A reviewing court need only inquire as to whether the state had a valid death penalty statute and whether it followed the statute in imposing the penalty; if the answer to these two questions is affirmative, then the arbitrariness and capriciousness have been conclusively removed. *Spinkellink*, 578

F.2d at 605. This Court finds that the answer to both of the above questions is affirmative.

26. Petitioner claims that there is no legitimate state interest in the death penalty. This argument must fail. The United States Supreme Court has found two purposes served by capital punishment, "retribution and deterrence of capital crimes by prospective offenders." *Gregg v. Georgia*, 428 U.S. 153, 183 (1976). Either of these purposes support the Montana legislature's decision to create a death penalty.

27. Petitioner claims that hanging constitutes cruel and unusual punishment. Petitioner cites no authority in support of his contention.

In 1972, the people of the State of Montana voted to retain the death penalty. The Montana Legislature has seen fit to provide the death penalty for the type of crime petitioner has been convicted of, and the Legislature chose death by hanging as the means of carrying out the sentence. It is not the prerogative [sic] of this Court to determine otherwise. That conclusion was aptly stated in *Gregg v. Georgia* as follows:

[I]n assessing a punishment selected by a democratically elected legislature against the constitutional measure, we presume its validity. We may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved. And a heavy burden rests on those who would attack the judgment of the representatives of the people.

This is true in part because the constitutional test is intertwined with an assessment of the contemporary standards and the legislative judgment weighs

heavily in ascertaining such standards. In a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people.

*Gregg v. Georgia*, 428 U.S. 153 (1976).

Additionally, petitioner has the option of electing lethal injection. This method of carrying out the death penalty has been found by a number of courts to be constitutionally permissible. *See, e.g., Felder v. Estelle*, 588 F.Supp. 664, 674 (S.D. Tex. 1984).

28. Petitioner claims that the Montana death penalty standards as to aggravating and mitigating factors are unconstitutionally vague. The aggravating factor in petitioner's case was Mont. Code Ann. § 46-18-303(7), "the offense was aggravated kidnapping which resulted in the death of the victim." The offense of "aggravated kidnapping" is defined in Montana's criminal statutes, and the jury found that the petitioner was guilty of aggravated kidnapping. There is nothing vague about the statute.

The mitigating factor in petitioners [sic] case was Mont. Code Ann. § 46-18-304(1), "the defendant has no significant history of prior criminal activity." Again there is nothing vague about this statute. The cases cited by petitioner in support of his position involved the interpretation of ambiguous "legal" language in states where the jury considers whether there are aggravating and mitigating circumstances. In Montana, it is a judge who determines the existence or non-existence of aggravating or mitigating factors. Mont. Code Ann. § 46-18-301.

29. Petitioner claims that the death penalty is excessive and disproportionate for this particular crime. Petitioner's cited authorities for this position are Supreme Court cases that have said that imposing the sentence of death for rape or kidnapping is excessive. *See Eberheart v. Georgia*, 433 U.S. 917 (1977); *Coker v. Georgia*, 433 U.S. 584 (1977). However, the Supreme Court has never held that the death penalty for aggravated kidnapping resulting in the death of the victim is excessive or disproportionate, and it is not.

30. The petitioner claims that the Montana Supreme Court failed to review similar cases to see if the death penalty was being imposed in similar cases. In *Pulley v. Harris*, \_\_\_, U.S. \_\_\_, 104 S.Ct. 871, 876 (1984), the Supreme Court rejected the claim that proportionality review in death cases is a constitutional requirement. Therefore, this issue is not reviewable by this Court on a petition for habeas corpus.

31. Petitioner claims that his death penalty is based on an *ex post facto* statute. The crimes that petitioner has been convicted of occurred on July 4, 1974. His trial ended on November 14, 1975. The death penalty statutes under which petitioner was resentenced to hang became effective July 1, 1977.

Article I, Section 10 of the United States Constitution states that "no State shall . . . pass any Bill of Attainder, ex post facto Law. . . ." It is well settled that any statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission; or which deprives one charged with crime of any

defense available according to law at the time when the act was committed, is prohibited as *ex post facto*. *Beazell v. Ohio*, 269 U.S. 167, 169-70 (1925).

"It is equally well settled, however, that the inhibition upon *ex post facto* laws does not give a criminal a right to be tried, in all respects, by the law in force when the crime was committed. The constitutional provision was intended to secure substantial personal rights against arbitrary and oppressive legislation, and not to limit the legislative control of remedies and modes of procedure which do not affect matters of substance." *Dobbert v. Florida*, 432 U.S. 282, 293 (1977).

In the instant case, the change in the statute was clearly procedural. The new statute simply altered the methods employed in determining whether the death penalty was to be imposed. There was no change in the quantum of punishment attached to the crime. The following language from *Hopt v. Utah*, 110 U.S. 574 (1884), applicable with equal force to the instant case, summarizes the conclusion that the change was procedural and not a violation of the *ex post facto* clause:

The crime for which the present defendant was indicted, the punishment prescribed therefor, and the quantity or the degree of proof necessary to establish his guilt, all remain unaffected by the subsequent statute.

*Hopt*, 110 U.S. at 589.

In the instant case, not only was the change in the law procedural, it was ameliorative. As Justice Rehnquist pointed out in *Dobbert v. Florida*, "it is axiomatic that for a



law to be *ex post facto* it must be more onerous than the prior law." *Dobbert*, 432 U.S. at 294.

The Montana Legislature enacted the new death penalty statutes specifically to provide the constitutional procedural protections required by the United States Supreme Court, thus providing capital defendants with more, rather than less, judicial protection. These protections demonstrate that the new death penalty statutes afford significantly more safeguards to the defendant than did the old. Hence, viewing the totality of the procedural changes wrought by the new statutes, this Court concludes that the new death penalty statutes under which petitioner was sentenced to death, did not work an onerous application of an *ex post facto* change in the law.

#### POST-CONVICTION RELIEF

32. The petitioner claims that the state district court judge should have recused himself as presiding judge over petitioner's petition for post-conviction relief in light of the fact that he was the sentencing judge. Mont. Code Ann. § 46-21-103 states that a petition for post-conviction relief be filed in either the court of conviction or the Supreme Court. The statute was designed to give the district court which made the initial determination a chance to correct any mistakes or irregularities that occurred in that court. In addition, the judge who presided over the trial and pronounced the sentence has before him all the facts required to make such determination.

The instant case involves thousands of pages of testimony, briefs, motions, and trial court records. The delay

and burden on the efficient administration of justice which would occur if another judge were required to familiarize himself with this record would serve no useful purpose.

33. The petitioner claims that the state district court judge never fairly considered petitioner's post-conviction relief petition. This is not really a separate claim, but rather an assertion that the district court judge acted unfairly when he ruled adversely to petitioner on the issues brought by petitioner in his petition for post-conviction relief. Those issues are addressed elsewhere in this opinion.

34. Petitioner claims that the Montana courts did not follow their rule that, in a civil proceeding, on a motion to dismiss all facts then properly pleaded must be considered as true. This is purely a matter of state procedural law and raises no federal constitutional question. Therefore, this Court is without jurisdiction to review this issue on a petition for a writ of habeas corpus.

35. Petitioner claims that the Montana statutes deny capital defendants the right to a jury trial on sentencing. This is the same issue raised by petitioner in his Claim No. 7. For the same reasons as set forth in the discussion of No. 7, this claim is meritless.

36. Petitioner claims that he is entitled to an evidentiary hearing before the state district court on his post-conviction relief claims. Petitioner is unable to cite any authority that there is a federal constitutional right to an evidentiary hearing in state court in a post-conviction collateral attack type of proceeding. Therefore, this issue is not properly before the Court.

*Discrimination*

37. Petitioner claims that his death sentence was imposed because of his race, poverty, and sex.

The Supreme Court has ruled that a showing that a state policy (the death penalty) impacts one racial or social group more than another, without more, will not result in a *per se* finding that the policy denies equal protection of the law. *City of Memphis v. Greene*, 451 U.S. 100, 119 (1981); *Spinkellink v. Wainwright*, 578 F.2d 582, 615 (5th Cir. 1978), *cert. denied sub nom* 440 U.S. 976 (1979). The state district court's sentencing order lists the factors which were considered and the manner in which those factors were weighed in the decision to impose the death penalty on petitioner. In cases where written findings of fact are made by a state court, federal courts in habeas corpus proceedings must defer to the state court's findings unless they are not fairly supported by the record. 28 U.S.C. § 2254(d); *Sumer [sic] v. Mata*, 440 U.S. 539 (1981); *United States v. Fike*, 538 F.2d 750, 754 (7th Cir. 1976).

In the instant case, the record supports the state district court's decision to impose the death penalty. The petitioner was found guilty of a heinous crime. The district court followed the mandates of Montana's death penalty statutes, considered the aggravating and mitigating factors, and determined that the death penalty was the appropriate penalty for petitioner's criminal acts.

*CONCLUSION*

The Court has reviewed literally thousands of pages of transcripts, briefs, and exhibits in this case. The Court

has addressed each of petitioner's thirty-seven issues and has found that none of them require an evidentiary hearing. Furthermore, the Court finds that all thirty-seven issues are appropriate for resolution on summary judgment. Based on the discussion above, the jury properly found petitioner guilty of aggravated kidnapping, deliberate homicide, and sexual intercourse without consent, and the trial judge properly sentenced petitioner to death.

The Court will issue an order in conformity to this memorandum opinion.

Done and dated this 8th day of August, 1985.

/s/ James F. Battin  
Chief Judge

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APPENDIX D

(p. 1165) Q. [by defense counsel, Charles Moses] Did Mr. Coleman have some rifles in his possession on July 4, 1974, in Roundup, Montana?

A. [by Nank] Not in Roundup, Montana, no.

Q. Where did he have these rifles?

A. Outside of Roundup, Montana.

Q. Where outside of Roundup, Montana?

A. Approximately ten miles out of town.

Q. Which direction?

A. That would be heading – I would have to look at the map. We were coming in from the – I don't remember the direction. I remember it was by the airport and that's the closest I can come.

(p. 1166) Q. They were in the possession of Mr. Coleman?

A. They were in the possession of both of us.

Q. I take it from your testimony that you must have hid these rifles before you got into Roundup?

A. Yes, we did.

Q. Did you ever go back and pick them up?

A. Yes, we did.

Q. And when did you do that?

A. I think we did this after the time that we came back to try to find Peggy's body, to dispose of it. That's my best recollection.

Q. Where are the rifles now?

A. They were in the possession of the sheriff of Rosebud County as far as I know.

Q. And where did you get the rifles?

A. Dewey and I stole them out of a house.

Q. And this was another crime that you committed?

A. That Dewey and I committed.

Q. I understand Mr. Coleman, and we'll get to him in a moment. It was a crime that you participated in and committed?

A. I did participate, yes.

(p. 1167) Q. Where did you do this?

A. Outside of Roundup, Montana, by the - approximately six miles from the airport.

Q. Would that be north of the airport?

A. I would have to look at the map to tell you. It could be north, yes.

Q. Did you know what road - where were you coming from?

A. I think we were coming from Lewistown or the Bozeman area or something.

Q. When did you leave Great Falls?

A. We left Great Falls at night time. I don't remember what date. It maybe was around the first, the first of July as close as I can remember.



Q. Where did you go, Mr. Nank, when you left in the night time from Great Falls, Montana?

A. We traveled and we met -

Q. Where did you go, sir?

A. We headed towards the area of Forsyth, Montana.

Q. How - what route did you take?

A. I illustrated that on the map yesterday and if you will show me the map again, I could show you the route.

(p. 1168) Q. Well, I'll get to the map in a moment. I just - do you know the route that you took?

A. I would have to use the map.

Q. Did you to to Lewistown?

A. I think we did.

Q. Do you know whether you did?

A. Yes, I think we did.

Q. Were you under the influence of any type of drug at that particular time?

A. We were under the influence of prescribed medication from the hospital.

Q. Directing your attention to a statement that you gave on May 14, 1975 - it is the same statement that we previously referred to, where the various attorneys were present including your attorney, Dewey M. Huss, and did you write in on that deposition after you read it over, a certain statement with respect to those rifles and I'm

directing your attention to page 42 and in lines 4 through 7. Could you read what is in writing there and read it to yourself?

A. Yes, I read it.

Q. And did you add that to the answer that you had previously given?

(p. 1169) A. Yes, I went through there to try to correct my mistakes that I had made under oath.

Q. So that you had an opportunity to look over the deposition and to make any corrections that you might have deemed relevant?

A. To the best of my mind that I would be allowed to make or for me to remember, yes.

Q. And the question was asked, "Did you ever see Mr. Coleman with any weapon, a knife, a gun, any weapon of that sort? Answer: From July 1st until July 7th? Question: Yes." And then your original answer was, "No", and then you wrote in, "Yes, two rifles on the afternoon of July 4th, but they were disposed of before we met Peggy Harstad."

A. That's true.

Q. They were disposed of before you met Peggy Harstad?

A. That's true.

(p. 1176) [By Mr. Moses] And you had been involved in the theft of some rifles according to your story, just the same day or the day before, isn't that right?

(p. 1177) A. We stole the rifles on July 4th.

Q. And so that you had been involved in a theft of personal property that very same day?

A. Yes, we were.

\* \* \*

Trial Tr. 1176:23-1177:4

(p. 1247) Q. [By special prosecutor Lee Overfelt] Now in this earlier testimony, in the original (p. 1248) case when you first testified, you did not mention to the Court and the jury that you had broken into this house near Roundup and stole the rifles, did you?

A. No, I did not.

Q. Why was that?

A. I was advised by you that I could not bring in any other crimes that me and Coleman - Mr. Coleman were involved in, without Mr. Moses bringing it out first.

Q. That's the reason that you didn't tell that to the Court and jury when you first testified?

A. Yes, it is, because you advised me that I could not bring any statement against Mr. Coleman.

Q. You mean any other crime?

A. About any other crimes that we had thought about or ever committed.

Q. Now tell the Court and jury exactly how that happened, this break-in. Tell us when it happened first of all.

A. It was on the same day of July 4th. It was in the afternoon, approximately 12 to one o'clock. I remember the color of the house. It was a green house. It was outside of Roundup, Montana. I took my motorcycle and went (p. 1249) through more or less a small fence that they had around their backyard. I parked my motorcycle in the back of this house so it could not be observed from the highway. First we went to the door bell and we rang the door bell to see if there was anybody home. I then gave my red helmet to Dewey Coleman. Dewey Coleman took my motorcycle helmet and broke the glass in the door, the rear back door. He then went to the left - when we got in the house, and I went to the kitchen area to observe other parts of the house, to see what we could find. Dewey found the rifles in the - I call it a den. We then took the rifles and I drove the motorcycle down the road. Dewey carried them on his right-hand side, both rifles, and I at that time made a suggestion that we not carry them into town and that we dispose of them, and we disposed of them by the Roundup airport.

Q. You say you disposed of them what do you mean by that?

A. We hid them.

Q. Did you at any time later reacquire these rifles?

A. Yes, we did.

Q. And what did you do with them?

(p. 1250) A. We took them back to Boise, Idaho.

Q. Did you have them in your possession at the time of your arrest?

A. Not in my possession, no.

Q. Where were they?

A. They were in the trunk of the Buick.

\* \* \*

Trial Tr. 1247:25-1250:6

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APPENDIX E

\* \* \*

(p. 2412) Q. [By special prosecutor Lee Overfelt] Now in connection with your trip from Sheridan, Wyoming with Mr. Nank, you deny that you considered or did participate in any robbery of a house and remove guns from it near Roundup?

A. [By Coleman] I never robbed a house near Roundup.

Q. And you were with Nank all the time you were in Roundup?

A. Yes.

Q. So he's completely wrong about any robbery involving guns at Roundup, Montana, or near there?

A. With me with him, yes.

Q. You deny that he was ever away from you long enough to have done that without the benefit of you being (p. 2413) around?

A. He left me in the park when I was in Roundup for a period of time.

Q. How long?

A. Maybe an hour, hour and a half or two hours.

Q. You never participated in any robbery yourself?

A. No, I did not.

\* \* \*



APPENDIX F

EXHIBIT B

IN THE DISTRICT COURT OF THE SIXTEENTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF ROSEBUD

CASE NO. 1083

\* \* \* \* \*

STATE OF MONTANA	)	No. 1083
Plaintiff	)	
vs	)	FINDINGS, CONCLUSIONS, JUDGMENT AND ORDER
DEWEY EUGENE	)	
COLEMAN	)	
Defendant	)	

\* \* \* \* \*

Pursuant to an Information filed on the 24th day of October, 1974, Dewey Eugene Coleman, defendant herein, was charged with the crimes of Deliberate Homicide, Aggravated Kidnapping and Sexual Intercourse Without Consent. A jury trial commenced October 23, 1975, and continued through November 14, 1975, at which time the Jury returned verdicts of "guilty" on the three counts. On November 21, 1975, this Court sentenced Coleman to the maximum punishment on each charge, that is: The defendant was sentenced to death for Aggravated Kidnapping; he was sentenced to 100 years for Deliberate Homicide; and he was sentenced to 40 years for Sexual Intercourse Without Consent. These sentences were ordered to be served consecutively.

This matter was appealed to the Montana Supreme Court, which in its decision of April 26, 1978, upheld each of the three convictions, but remanded this matter for re-sentencing. The Supreme Court held that there was no showing of the infliction of bodily injury during the course of the rape of the victim, and that, therefore, in the absence of that aggravating circumstance the maximum penalty for the crime is 20 years. The Supreme Court also held that Section 94-5-304, R.C.M. 1947, is unconstitutional because it proscribes a mandatory imposition of the death penalty. The Court rejected the defendant's claim that two jurors were excused for cause in violation of the Witherspoon Rule because of their views on capital punishment. The Court limited its decision on overturning the death penalty to the absence of procedural requirement: allowing the trial Court to consider any mitigating circumstances in its imposition of a penalty under the unconstitutional death penalty statute. The Court stated, as follows:

"Under this statute, if the court finds, as it did in this case, that the victim of an aggravated kidnapping died as a result of the crime, the convicted defendant must be sentenced to die. There is no provision for the trial court to consider any mitigating circumstances. It only allows the court to determine the aggravating circumstances of death. This is not constitutionally permissible.

To have a constitutionally valid death penalty, the United States Supreme Court has established certain necessary procedures. See: *Gregg v. Georgia*, (1976), 428 U.S. 153, 56 S.Ct. 2909, 49 L.Ed.2d 859; *Proffitt v. Florida*, (1976), 428 U.S. 242, 94 S.Ct. 2960, 49 L.Ed.2d 914; *Jurek v. Texas*, (1976), 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929. None of those required procedures are present in Montana's death penalty statute as it

existed in 1974, nor were they provided otherwise in this case. Thus, defendant's death sentence cannot stand."

On the 14th day of June, 1978, a separate sentencing hearing was held to determine the existence or non-existence of aggravating circumstances or mitigating circumstances in line with the provisions of Sec 95-2206.6, 95-2206.7, 95-2206.8 and 95-2206.9, R.C.M., 1947. At time of the sentencing hearing the defendant filed a Motion to Quash, and when offered an opportunity to present evidence or any matter in mitigation, declined to do so. Following the hearing the court granted the state and the defendant time to file briefs particularly with reference to defendant's Motion to Quash. Briefs and the law having been considered, the trial court addresses the principal legal issues raised.

As noted by Coleman in his appellate brief (pp. 178, 179) Sec. 95-5-304, R.C.M., 1947, originally provided that "A court shall impose the sentence of death following conviction of aggravated kidnapping if it finds the victim is dead as a result of the criminal conduct *unless there are mitigating circumstances.*" The legislature amended this section by striking the portion of the language underlined above. This legislative action, made it clear that the sentencing court need not consider mitigating circumstances upon conviction of aggravated kidnapping. As pointed out above the statute as amended was declared unconstitutional in this case, but the Supreme Court in remanding for resentencing did not specifically declare if the trial court could or could not impose the death penalty. Coleman argues that since the mandatory statute was

declared unconstitutional, Coleman cannot be sentenced to death under laws enacted after his conviction.

The Supreme Court at page 11 of its opinion indicates that if the death penalty had been imposed under proper procedural safeguards, the sentence would have been upheld. The Court states:

"To have a constitutionally valid death penalty, the United States Supreme Court has established certain necessary procedures. (citations) None of these required procedures are present in Montana's death penalty statute as it existed in 1975, nor were they provided *otherwise in this case*. (emphasis supplied) Thus defendant's death sentence cannot stand."

The emphasized language strongly suggests that if the sentencing court had observed procedural requirements declared by recent U. S. Supreme Court decisions, the death penalty would have been upheld notwithstanding that Montana's mandatory law was unconstitutional.

The later enactment of Sections 95-2206.6, et seq, spelling out the procedure, should not operate to take away the court's power to impose the death penalty under proper procedural safeguards. The death penalty is an operative fact under the Montana Constitution and Section 95-5-303, R.C.M. 1947, and are not to be ignored because a procedurally defective statute is abrogated and other statutes are substituted therefor. As argued by the State from the *Dobbert* case, the circumstance that the defendant is afforded greater procedural protection by the trial court's utilization of sections 95-2206.6, et seq., does not fall within the prohibition of ex post facto laws.

In summary, the trial court in now pronouncing sentence is in a position to utilize the interim developments in sentencing procedure as reflected in recent U. S. Supreme Court decisions and the Montana statutes enacted in response thereto.

Both parties having been given the opportunity to place before the Court all matters each deemed relevant and competent bearing upon a determination of appropriate sentences to be imposed upon the three guilty jury verdicts rendered, and the Court having reviewed all matters submitted, together with the evidence produced at trial, and after observing the defendant's demeanor during the trial and while testifying on his own behalf, the Court now makes the following Findings, Conclusions, Judgment and Order.

#### *FINDINGS*

1. That on July 4, 1974, the defendant and Robert Dennis Nank were on the road on Nank's motorcycle on a journey which began at the Sheridan Veterans Administration Hospital in Sheridan, Wyoming, and continued through various towns in Montana to Roundup, Montana. The two men burglarized a home in Roundup, Montana, on July 4, 1974, and stole several rifles which were subsequently buried near the Roundup Airport. Later in the day the two men decided that they would rob someone along U.S. Highway No. 12 between Roundup, Montana, and Forsyth, Montana, and that they would kill the witnesses to destroy the evidence. With the motorcycle alongside the road, they began hitchhiking. A car occupied by a Mr. and Mrs. Paul Koester of Forsyth,

Montana, stopped, but were frightened and left hurriedly as the defendant moved to obtain entry into the vehicle. At about 10:00 P.M. Miss Peggy Harstad of Rosebud, Montana, stopped and offered the two men a ride. They took control of her and her automobile, tied her with a rope, and took her to a remote location north of Vananda, Montana, where both men attempted to engage [in] sexual intercourse without consent with her. The victim was in menstruation [sic] at the time. Holding her upon her back in the rear of the automobile, the defendant engaged in the act of sexual intercourse without consent, while the victim pleaded with him not to. They drove through Forsyth to a secluded spot adjacent to the frontage road just east of Forsyth, Montana, where Coleman announced his decision to kill Miss Harstad. They then drove back through Forsyth to the bridge on U.S. Highway No. 12 over the Yellowstone River to an isolated area across the Yellowstone River from Forsyth near an abandoned Milwaukee Railroad depot. In this area Coleman initiated the assault upon the victim by swinging his motorcycle helmet by the chin strap and crashing it against the victim's head. Then the defendant placed the yellow nylon rope around the victim's neck and attempted to strangle her. Then both the defendant and Robert Nank carried the victim down to a slough and, the defendant held her under the water. The victim rose out of the water briefly and then both men went into the water and held her under until she expired.

2. That the State has been unable to prove by means of record checks that the defendant has any other history of criminal activity. The only other criminal act which appears in the trial record in this cause is the aggravated



burglary of a home in Roundup, Montana, where certain guns were stolen by the defendant and Robert Nank on July 4, 1974. By reason of the foregoing, the credit in mitigation allowed by Section 95-2206.9(1) is not appropriate to this defendant.

3. That there is no evidence appearing, either in the record of the trial held in this cause or the special sentencing hearing accorded, supporting a finding of any of the circumstances in mitigation under the other numbered paragraphs of Section 95-2206.9, namely paragraphs (2) through (8). There is, likewise, no evidence of any facts which are operative in this case to mitigate the penalty in this cause. The Court therefore finds, as follows:

a. That the offenses charged and proven in this cause were not committed while the defendant was under the influence of any mental or emotional disturbance; and

b. That in committing the acts charged and proved the defendant did not act under extreme duress or under the substantial domination of another person, rather the defendant's decisions to kidnap, rape and murder were the result of conscious deliberation and were his independent decisions arrived at despite contrary arguments advanced by Robert Nank against the murder of the victim; and

c. That the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was not substantially impaired; and

d. That the victim was not a participant in the defendant's conduct and did not consent to any of the acts, rather that she resisted, and pleaded with the defendant at various times throughout the course of events which resulted in her death; and

e. That the defendant was not a relatively minor accomplice, nor was his participation in the offenses relatively minor, rather that the defendant was the decision-maker and the dominating influence in the criminal acts committed against the victim; and

f. That the defendant at the time of the commission of the offenses was 27 years of age.

4. That at the prior sentencing hearing, this Court imposed the sentence of 100 years for the crime of deliberate homicide. That at the prior sentencing hearing the Court imposed the sentence of 40 years for sexual intercourse without consent; that these sentences were ordered to run consecutively.

### CONCLUSIONS

The Court concludes as follows:

1. That the aggravating circumstances set forth in Section 95-2206.8, paragraph (7) exists for the reason following:

That the offense of aggravated kidnapping was committed by the defendant and it resulted in the death of the victim, Miss Peggy Harstad.

2. That none of the mitigating circumstances listed in Section 95-2206.9 R.C.M. are sufficiently substantial to

call for leniency. That the only mitigating circumstance technically present in this cause is that the defendant has no record history of prior criminal activity.

From the foregoing Findings and Conclusions, the Court now renders its

*JUDGMENT and ORDER*

as follows:

1. The defendant, Dewey Eugene Coleman, having been found guilty of the crime of Aggravated Kidnapping by a jury on November 14, 1975, and the Court having specifically found beyond a reasonable doubt that the aggravating circumstances set forth in Section 95-2206.8(7) exist in relation to this offense, and that no circumstances exist in mitigation of the penalty, the defendant, Dewey Eugene Coleman, is hereby sentenced to death for the crime of Aggravated Kidnapping. Said punishment is to be inflicted by hanging Dewey Eugene Coleman by the neck until he is dead between the hours of six o'clock A.M. and six o'clock P.M. on the 31st day following the completion of the automatic review of this case by the Montana Supreme Court. The execution of said sentence shall be supervised by the Sheriff of Yellowstone County pursuant to Section 95-2303 R.C.M. 1947.

2. The defendant, Dewey Eugene Coleman, having been found guilty of the crime of Sexual Intercourse Without Consent by a jury on November 14, 1975, the defendant, Dewey Eugene Coleman, is hereby sentenced to be imprisoned in the Montana State Penitentiary for a

term of 20 years for the crime of Sexual Intercourse Without Consent.

3. The sentences hereby imposed are to be served consecutively with the sentence of 100 years for Deliberate Homicide which is not disturbed hereby. The defendant is hereby remanded to the custody of the Rosebud County Sheriff to be transported by him to the Montana State Penitentiary to await the final order of this Court pertaining to the execution of the remainder of the sentence herewith imposed. The defendant is to receive credit for time served, from the date of his initial incarceration on these charges on October 17, 1974, to the date of this judgment.

Dated this 10 day of July, 1978.

/s/ A. B. Martin  
A. B. Martin  
District Judge

cc: John S. Forsythe  
Charles F. Moses

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SEP 25 1989

JOSEPH F. SPANIOL, JR.  
CLERK

In The  
**Supreme Court of the United States**  
October Term, 1989

JACK McCORMICK,  
Warden of the Montana State Prison, and  
MARC RACICOT,  
Attorney General of the State of Montana,

*Petitioners,*

v.

DEWEY E. COLEMAN,

*Respondent.*

On Petition for Writ of Certiorari  
to the United States Court of Appeals  
for the Ninth Circuit

BRIEF OF AMICI CURIAE  
IN SUPPORT OF PETITIONERS  
THE STATE OF IDAHO JOINED BY:  
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NEBRASKA, NEVADA, NEW MEXICO, NORTH  
CAROLINA, PENNSYLVANIA, SOUTH CAROLINA,  
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## QUESTIONS PRESENTED FOR REVIEW

1. Does the Due Process Clause bar the retroactive application of a constitutional capital sentencing scheme upon resentencing of a criminal defendant whose trial occurred when a mandatory death penalty was in effect, even though such retroactive application is permitted by the *Ex Post Facto* clause?

2. May a novel due process theory be applied on collateral review to overturn a death sentence which was final in 1979?

3. Does harmless error analysis apply to a due process violation arising from the retroactive application of capital sentencing procedures; and if the error may not be deemed harmless, what is the appropriate remedy?

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No. 89-187

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In The  
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October Term, 1989

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CAROLINA, PENNSYLVANIA, SOUTH CAROLINA,  
SOUTH DAKOTA, UTAH AND WYOMING

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## INTERESTS OF AMICI<sup>1</sup>

Courts of the amici states follow rules of law in capital and other cases that are directly or potentially affected by the decision of the Court of Appeals for the Ninth Circuit in *Coleman v. McCormick*, 874 F.2d 434 (9th Cir. 1989). The decision alters precedent on which the amici states have relied.

The unjustified expansion of due process protections accomplished by the Court of Appeals' decision far exceeds the scope of this Court's cases and threatens to create a substantial obstacle to law enforcement in any state where this theory of due process of law is followed.

The lower court's holding that harmless error analysis cannot be applied to the kind of due process violation it has defined is inconsistent with this Court's cases and creates for amici another obstacle to the finality of state court judgments not justified by federal constitutional law.

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## SUMMARY OF ARGUMENT

1. A defendant on trial for murder is not deprived of the quality of notice required by the Due Process Clause when a state later makes a change in its death sentencing law that provides the defendant a previously

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<sup>1</sup> The State of Hawaii, by its Attorney General, joins the arguments presented by this brief because of the importance of the issues to the administration of the criminal law and the habeas corpus statute. Hawaii does not have a death penalty statute and takes no position on issues related to death sentencing.



nonexistent opportunity to have mitigating evidence considered. This Court's precedent affords no basis for a conclusion that the Due Process Clause is violated by a retroactive sentencing procedure that complies with the Ex Post Facto Clause. The Court of Appeals' decision conflicts with this Court's precedent and with the decisions of other appellate courts.

2. The federal and state interest in the finality of judgments favors a rule whereby novel theories of constitutional right may not be considered for the first time on federal collateral review.

3. The Court of Appeals' view of *per se* constitutional error arising out of its novel due process definition is not consistent with this Court's applicable precedent. The opinion below refuses to apply harmless error rules to occurrences that *benefited* defendant and which had no serious potential for affecting the outcome of the case to his disadvantage.

---

## REASONS FOR GRANTING THE WRIT

### I

#### The Decision Of The Ninth Circuit Court Of Appeals Conflicts With This Court's Precedent Applying The Due Process And Ex Post Facto Clauses

The Court of Appeals held that Coleman was deprived of due process of law because he did not know at the time of trial that Montana would later ameliorate the rigor of its mandatory death penalty by giving the sentencing court the discretion to consider mitigating factors. As the Court of Appeals saw it, Coleman should

have been given notice "of the life and death consequences of his actions in defending himself against the state's prosecution before and during trial." App. 18.

To the Court of Appeals, fairness required that Coleman's counsel know at the time of trial that the death penalty would not be mandatory. Without such knowledge, Coleman's counsel was thought to be in no position to make informed choices about what evidence should be offered, whether Coleman should testify, and whether the trial judge should have been disqualified without cause. For example, counsel might have avoided evidence of Coleman's prior criminal activity had he known that such evidence could be used to negate mitigation; Coleman might not have testified and thus exposed his demeanor on the stand had he known that his testimony would be considered at the time of sentencing. "Apparently," the court observed, "Coleman's trial counsel believed that it was necessary for Coleman to testify in order to avoid a conviction. But would he have made this same choice if he had known Coleman's testimony . . . would be considered at a post-conviction sentencing hearing on the question whether Coleman lived or died?" App. 16.

In sum, it was not enough that counsel's choices be informed by adequate preparation and knowledge of the law. Counsel needed also to be aware of unanticipated future changes in sentencing law that would operate to his client's benefit.

The theory that Coleman might have wanted to testify at trial to avoid a conviction but might not have wanted to testify at a sentencing proceeding is not a plausible reason for setting aside Coleman's conviction.

Evidently, the Court of Appeals thought there was some chance that Coleman might have preferred a conviction to an acquittal as long as he received a sentence less than death. In such case Coleman would have chosen to forego giving the exculpatory testimony he considered necessary for an acquittal in order to prevent the sentencing court from observing his demeanor and learning of his past crimes. As well as being unrealistic, this is somewhat circular reasoning. If Coleman's trial testimony were viewed as exculpatory, that is, necessary for an acquittal, counsel would likely also have thought it to be mitigating.

The Due Process Clause protects such interests as those identified by the Court of Appeals only if it protects a "sporting theory of justice" in which the game is its own end and the legitimacy of the outcome is of only passing interest, if it is of any interest at all. This Court, however, has rejected the notion that the Due Process Clause protects mere trial stratagems which depend upon withholding facts from the trier of fact or upon requiring the State to furnish the defendant with a basis for predicting all of the factors that might affect the trier's decision. *Brady v. Maryland*, 373 U.S. 83 (1963); *United States v. Agurs*, 427 U.S. 97 (1976).

Due process of law upholds interests more fundamental than strategic options. The Due Process Clause has, historically, been applied to deliberate decisions of government agents to deprive one of life, liberty or property. Its protections were intended to secure the individual from the arbitrary exercise of the powers of the government. *Daniels v. Williams*, 474 U.S. 327 (1986). The clause promotes fairness in decisions to deprive one of life, liberty or property by requiring that appropriate

procedures be followed. *Id.* The Court has said that the Due Process Clause protects the individual against two types of government action:

So-called "substantive due process" prevents the government from engaging in conduct that "shocks the conscience," *Rochin v. California*, 342 U.S. 165 or interferes with rights implicit in the concept of ordered liberty. *Palko v. Connecticut*, 302 U.S. 319.

When government action depriving a person of life, liberty or property survives substantive due process scrutiny, it must still be implemented in a fair manner. *Matthews v. Eldridge*, 424 U.S. 319. This requirement has traditionally been referred to as procedural due process. *United States v. Salerno*, 481 U.S. 739, 746 (1987).

It has also been held that the Due Process Clause is violated when government action offends some principle of justice so deeply rooted in our legal traditions as to be considered fundamental. *Snyder v. Massachusetts*, 291 U.S. 97 (1934). That process which is due is that which has received judicial acceptance as an important element of fair proceedings.

It is at once apparent that the Montana procedure followed in Coleman's case does not offend any historically accepted principle of justice. Expressly to the contrary, retroactive application of ameliorative death sentencing standards was approved by the Court in *Dobbert v. Florida*, 432 U.S. 282 (1977), against a claim that the procedure violated the Ex Post Facto Clause of Article I, Section 10. It would be incredible to think that the Court had approved a retroactive statutory application under the Ex Post Facto Clause while at the same time believing that the process it approved shocked the conscience, interfered with rights implicit in the concept of ordered

liberty or offended some principle of justice so deeply rooted in our legal traditions as to be considered fundamental.

Although the Due Process Clause may be broader in the protections it affords, it does not furnish a basis for the development of principles of fairness that are irreconcilable with those defined under the Ex Post Facto Clause. The tenor of the judgment below is that the practice followed in Coleman's case is fundamentally fair for ex post facto purposes and fundamentally unfair for due process purposes, a view that renders the Ex Post Facto Clause superfluous.

The values protected by the Ex Post Facto Clause, in the context of this case, are coextensive with the interests protected by the Due Process Clause.

In *Marks v. United States*, 430 U.S. 188, 191-192 (1977), the Court explained that the Ex Post Facto Clause differs from the Due Process Clause not in the nature of the rights protected, but in the objects of regulation:

The Ex Post Facto Clause is a limitation upon the powers of the legislature [citation omitted] and does not of its own force apply to the Judicial Branch of government. [Citation omitted.] But the principle on which the clause is based – the notion that persons have a right to fair warning of that conduct which will give rise to criminal penalties – is fundamental to our concept of constitutional liberty. [Citation omitted.] As such, *that right is protected against judicial action by the Due Process Clause of the fifth Amendment . . .* " (emphasis added)

It is implicit in *Marks* that questions of notice that would be resolved *in favor* of the state under the Ex Post



Facto Clause cannot properly be resolved *against* the state under the Due Process Clause.

In *Coleman v. Saffle*, 869 F.2d 1377 (10th Cir. 1989), the Tenth Circuit Court of Appeals held, contrary to the Ninth Circuit view, that resentencing in a capital case, following a constitutionally required restructuring of state law, did not violate either the Ex Post Facto Clause or the Due Process Clause. The court applied *ex post facto* principles to decide the due process issue.

Cf. *Weaver v. Graham*, 450 U.S. 24, 30 (1981) ("critical to relief under the Ex Post Facto Clause is not an individual's right to less punishment, but the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was committed").

The absence of tension between the two constitutional clauses is shown by the regulatory objects of each. The Ex Post Facto Clause defines particular prohibited action while the Due Process Clause incorporates these specific inhibitions as part of a more general assurance of fundamental fairness. The Ex Post Facto Clause restrains enactments that retrospectively disadvantage offenders affected by them, *Id.*; the Due Process Clause operates to protect affirmative, enforceable rights, *Id.*, *Snyder v. Massachusetts*, *supra*. Cf. *Spencer v. Texas*, 385 U.S. 554 (1967). (the Due Process Clause "guarantees the fundamental elements of fairness in a criminal trial," but it does not establish the Supreme Court as a rule making organ for rules of criminal procedure 385 U.S. at 563-564). If there is no identified right to notice of an unexpected future change of law, there is nothing for the Due Process Clause



to protect. The Court of Appeals has gotten this backward by its finding that a claim of right that cannot be accepted under the Ex Post Facto Clause stands on its own as a due process right.

In varying contexts, the Court has rejected arguments that the accused has a constitutionally protected interest in being able to predict all of the unforeseen advantages or disadvantages that may be consequences of his strategic choices. In *Murray v. Carrier*, 477 U.S. 478 (1986), the Court held that a defendant assumes the ordinary risk that his attorney may misjudge the consequences of the law or the facts. See also *McMann v. Richardson*, 397 U.S. 759 (1970). In *United States v. Agurs*, *supra*, the Court found that the defendant was not entitled to disclosure of everything that might affect the case:

The Court of Appeals appears to have assumed that the prosecutor has a constitutional obligation to disclose any information that might affect the jury's verdict. That statement of a constitutional standard of materiality approaches the "sporting theory of justice" which the court expressly rejected in *Brady*. For a jury's appraisal of a case "might" be affected by an improper or trivial consideration as well as by evidence giving rise to a legitimate doubt on the issue of guilt. If everything that might influence a jury must be disclosed, the only way a prosecutor could discharge his constitutional duty would be to allow complete discovery of his files as a matter of routine practice. 427 U.S. at 108-109.

Notwithstanding the thrust of this authority, the Court of Appeals has created a novel due process right to notice of future legal developments that might affect

aspects of trial strategy which are not even concerned with the truth-seeking function of the criminal trial.

The criminal law of most states is inconsistent with the principle espoused by the Court of Appeals.

In *Cartwright v. State*, Ct. Crim. App., Oklahoma, No. H-88-820, July 31, 1989 (Subject to revision or withdrawal until released for publication), the Oklahoma Court of Criminal Appeals, relying on *Coleman v. Saffle*, *supra*, upheld the reimposition of a death sentence after a procedural modification compelled by this Court's decision in *Maynard v. Cartwright*, 108 S.Ct. 1853 (1988). The court considered the due process and ex post facto concerns to be the same in the context of the issues raised, a position quite different from that of the Ninth Circuit Court of Appeals in *Coleman*.

A number of state courts have held that aggravating circumstances arising subsequent to conviction could be considered at sentencing in support of findings of statutory aggravation. *Reddix v. State*, 381 So.2d 999 (Miss. 1980); *People v. Malone*, 762 P.2d 1249 (Cal. 1988), *rehearing den.*, January 9, 1989; *Torres-Arbaleido v. State*, 524 So.2d 403 (Fla. 1988); *State v. Terry*, 360 S.E.2d 588 (Ga. 1987); *People v. Albanese*, 473 N.E.2d 1146 (Ill. 1984); *State v. Richmond*, 666 P.2d 57 (Ariz. 1983). *Coleman* conflicts with these decisions. Trial counsel could not have predicated trial strategy on postconviction occurrences and would therefore not have had the quality of notice *Coleman* demands.

A related issue is before this Court in *Clemons v. Mississippi*, No. 88-6873, where the question is whether an appellate court in a state with jury sentencing may

reweigh aggravating and mitigating factors. If it is necessary as a matter of due process that defendant's counsel have notice of future changes in sentencing procedure, it would also seem to be necessary that trial counsel be able to plan his strategy with notice of what aggravating factors will be considered legally valid in future appellate proceedings. If this is so, as *Coleman* implies, a future invalidation of a statutory aggravating circumstance would in all cases undo not only the sentence, but the trial as well.

Other state and federal courts have uniformly construed the Due Process and Ex Post Facto Clauses to be consistent in the nature of the interests protected. *Rubino v. Lynaugh*, 845 F.2d 1266 (5th Cir. 1988) (The Due Process Clause protects against judicial action that would violate the Ex Post Facto Clause); *United States v. Robinson*, 843 F.2d 1 (1st Cir. 1988) (Ex Post Facto and Due Process Clauses construed consistently). See also: *People v. Easter*, 197 Cal.App.3d 183 (Cal. App. 1987); *People v. Hamilton*, 756 P.2d 1348 (Cal. 1988); *Johnson v. State*, 472 A.2d 1311 (Del. 1983); *Bryant v. State*, 446 N.E.2d 364 (Ind. App. 1983); *Chalin v. State*, 645 S.W.2d 265 (Tex. Ct. App. 1962); *State v. R.H.*, 273 S.E.2d 578 (W. Va. 1980).

Even the Ninth Circuit Court of Appeals has previously held that the Ex Post Facto Clause is a legislative restraint while the accused must look to the Due Process Clause to bar ex post facto applications of law created by judicial action. See *United States v. Walsh*, 770 F.2d 1490 (9th Cir. 1985); *Knapp v. Cardwell*, 667 F.2d 1253 (9th Cir. 1982). The court's holding that an application valid under the Ex Post Facto Clause can be a violation of due process is not consistent with the view that the Due Process

Clause *extends* the specific protections of the Ex Post Facto Clause to judicial action.

## II

### **New Procedural Rules Should Not Be Permitted To Affect Cases On Collateral Review**

Amici agree with the position of the State of Montana that "application of a constitutional rule not in existence at the time the conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system." *Teague v. Lane*, 109 S.Ct. 1060, 1074 (1989).

*Teague v. Lane* was concerned with the defendant's demand, raised in the courts below, that new rules relating to jury selection be applied to him. The Court held that the rule of *Batson v. Kentucky*, 476 U.S. 79 (1986), would not be applied retroactively to cases on collateral review.

This case, which is over fourteen years old, furnishes an example of a lack of finality that is altogether too common in capital cases. This Court has recognized the interests of the states in obtaining some measure of finality for death sentencing judgments. See, *Barefoot v. Estelle*, 463 U.S. 880 (1983). Coleman's conviction should not now be subject to a new, novel and patently incorrect legal analysis which has become the basis for another remand.

## III

### **The Harmless Error Analysis Of The Court Of Appeals Is Incorrect**

Coleman was originally sentenced under a mandatory death penalty statute. Following the decision in

*Woodson v. North Carolina*, 428 U.S. 280 (1976), disapproving such statutes, Coleman was given the benefit of a resentencing proceeding at which safeguards announced in *Gregg v. Georgia*, 428 U.S. 153 (1976), *Profitt v. Florida*, 428 U.S. 242 (1976), and *Jurek v. Texas*, 428 U.S. 262 (1976), were observed. Coleman's sentence is grounded on the modified sentencing procedures. Thus, in contrast with the usual case, Coleman was before the Court of Appeals complaining that he had been placed at a disadvantage by being resentenced according to procedures more beneficial to him than those that had been applicable at his first sentencing proceeding. Even more startling than the fact that the court accepted this analysis is the circumstance that the court found that this "error" could not be harmless. In doing so, the court disregarded the presumption of harmlessness discussed in *Rose v. Clark*, 478 U.S. 570 (1986).

The Court of Appeals considered the ameliorative sentencing proceeding so pervasive an intrusion on Coleman's rights that it required a new trial, a view summed up by the court's observation that "Coleman had no reason to suspect that his decisions at trial would come back to haunt him at the sentencing hearing."<sup>2</sup> App. 18. The problem, in the view of the Court of Appeals, was the "countless tactical decisions at trial aimed solely at obtaining Coleman's acquittal, without even a hint that

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<sup>2</sup> One would think that Coleman at least expected that such trial decisions as failed to procure his acquittal might "come back to haunt him at sentencing." The Court of Appeals' decision is tantamount to a holding that there is some kind of due process right to be provided with the tools to avoid the consequences of a valid finding of guilt.



evidence in the record would be considered as either mitigating or aggravating factors." App. 21.

The Court of Appeals' argument is not logically sound and is certainly not required by this Court's precedent. The court's approach to harmless error analysis is grounded on the questionable assumption that there might be some circumstance in which evidence that would help procure an acquittal might prove disadvantageous at sentencing. Thus, "Coleman's counsel might not have called his client to testify under the new statute. He might not have brought in evidence of Coleman's prior criminal activity in his cross-examination of Nank. He might have challenged the trial judge." App. 21. This strained view of the disadvantage inflicted on Coleman by subjecting him to a more beneficial resentencing proceeding ignores the substance of this Court's decisions defining harmless error.

Violations of basic constitutional protections are not harmless if they create a substantial possibility that the error may have affected the outcome of the case. This rule limits remedies for error, as well as stating a concept of reversibility. *Chapman v. California*, 386 U.S. 18 (1967). The reviewing court must assess the entire record and must be satisfied that the error of which complaint is made had more than a slight effect. *United States v. Hasting*, 461 U.S. 499 (1983); *United States v. Agurs*, *supra*.

The Court of Appeals' decision follows a wide path around and away from the established limitations on a federal appellate court's right to reverse a state judgment. Instead of merely holding that the defendant is entitled to such notice of the charges against him as would protect



him from being placed twice in jeopardy and would enable him to prepare a defense, the Court of Appeals has created a right to a particular quality of strategic decision at trial. To be sufficient, such decisions must be made with knowledge of uncertain factors that might affect counsel's judgment.

The application of harmless error rules to this formulation is particularly difficult because a reviewing court must attempt to discern the impact on the factfinder of strategic decisions that might have been made if the circumstances had been different. This Court has not required that such strategic judgments be subjected to review according to how they might have been affected by notice of future sentencing benefits. As a general rule, the consequences of counsel's strategic choices are borne only by the defendant and his attorney. *Strickland v. Washington*, 466 U.S. 668 (1984). It is impossible to assess the effect of most strategic decisions made by the defendant's counsel. No one could accurately calculate how a decision not to call witnesses affected the factfinder, or how much more impressed the factfinder might have been with the defendant's case if he had not testified. Yet the Court of Appeals' decision requires that cases turn on such imponderables.

The harmless error rule is intended to avoid reversals for insignificant errors. It is especially important in the relationship between state and federal courts that the federal judiciary scrupulously avoid interfering with state judgments for insufficient reasons. See, *Satterwhite v. Texas*, 486 U.S. \_\_\_\_ (1988) (the harmless error rule "promotes respect for the criminal legal process by focusing on the underlying fairness of the trial rather than on the

virtually inevitable presence of immaterial error"). The Court of Appeals "pervasive error" theory ignores these considerations. It makes the adequacy of notice depend on counsel's being free of the need to assess variables like those every litigant faces and on having almost certain knowledge of the outcome of future appellate decisions.

This Court has "stressed on more than one occasion that the Constitution entitles a criminal defendant to a fair trial, not a perfect one." *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986). The rule adopted by the Court of Appeals tells us that if there is any doubt about whether counsel's judgment respecting the production of evidence and the conduct of the trial might have been affected by unforeseen variables, the Due Process Clause requires a new trial. The court could not have come closer to requiring a "perfect" trial, in clear violation of this Court's precedent.

As well as being contrary to this Court's cases, the approach taken by the Ninth Circuit Court of Appeals is inconsistent with the law prevailing in other jurisdictions.

In *Sawyer v. Butler*, 848 F.2d 582 (5th Cir. 1988), the Fifth Circuit Court of Appeals held that the trial court's failure to appoint counsel with more than five years experience, in violation of state law, was harmless error because there was no demonstrable prejudice to the defendant. This conclusion required an assessment of counsel's performance in the circumstances of the case. The argument, rejected in *Sawyer*, that counsel was too inexperienced implies that he was not equipped to make the kind of informed strategic judgments required by

*Coleman*. The Ninth Circuit rationale would probably have led to reversal in *Sawyer v. Butler*.

In *Coleman v. Saffle*, 869 F.2d 1377 (10th Cir. 1989), the Tenth Circuit Court of Appeals found harmless error in the submission of an invalid aggravating circumstance to a sentencing jury, concluding that the strength of the evidence supporting the valid aggravating factors showed convincingly that the sentencing authority would have sentenced the defendant to death even in the absence of the asserted error. This application of the harmless error rule is at odds with the decision below, where the Ninth Circuit found that "the due process violation had a pervasive effect on the composition of the trial record," App. 21, and that there was thus no way to determine how counsel might have made "countless tactical decisions" in the absence of the "error." If the Due Process Clause requires that counsel have the ability to control his presentation of facts at trial by measuring his tactical decisions against the knowledge that he will have to present evidence in mitigation, it must also require that he know, at the time of trial, what aggravating factors he must answer.

On the face of it, the occurrences of which the Ninth Circuit Court of Appeals complains should have been considered harmless. Taking account of the aggravated nature of the crime, it is difficult to imagine that Coleman's demeanor as a witness in his favor or the court's knowledge of his participation in prior noncapital offenses would have had any effect on the sentencing authority's judgment.

The court's concern for the prejudice Coleman possibly suffered because he testified and because his attorney cross-examined about his criminal record is founded almost wholly on an illusory view of what the sentencing proceeding might have been like in different circumstances. All of the information that came in at trial about Coleman's character, credibility and past criminal conduct could have been presented by the state at the sentencing hearing no matter what Coleman did. *See*, Mont. Code Ann. § 46-18-302. If Coleman's lawyer thought the trial strategy he pursued would help to gain an acquittal – as apparently he did – it is difficult to believe that he would have shunned this course as a means of avoiding sentencing evidence that legally could not be avoided. That Coleman's conviction should have been set aside for reasons such as these reveals a total lack of deference to state judgments.

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## CONCLUSION

The petition for a writ of certiorari should be granted. The decision of the Ninth Circuit Court of Appeals has defeated the good faith effort of the State of Montana to apply its capital sentencing law in accordance with federal constitutional requirements. The precedent created is not consistent with this Court's decisions and thus represents an unwarranted intrusion upon Montana's power to enforce its law.

Respectfully submitted,

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No. 89-187

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Supreme Court, U.S.

FILED

SEP 29 1989

JOSEPH F. SPANIOLO, JR.  
CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1989

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JACK McCORMICK, Warden of the Montana State Prison,  
and MARC RACICOT, Attorney General of the State of Montana,

Petitioners,

v.

DEWEY E. COLEMAN,

Respondent.

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BRIEF IN OPPOSITION TO WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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1989



QUESTIONS PRESENTED

1. Was the Court of Appeals correct in its unanimous conclusion that a capital defendant "is due at least that amount of process which enables him to put on a defense during trial knowing what effect such a strategy would have on subsequent capital sentencing"?

2. Can the State argue for the first time in this Court that this legal principle is a "new" constitutional rule which should not be retroactive to this case?

3. Is this a "new rule" of federal constitutional law?

4. Can a violation of this due process principle, which has caused defense counsel in a capital case to try the case without knowing the sentencing implications of any of his decisions and actions before or during trial, be held to be harmless error?

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JACK McCORMICK, Warden of the  
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v.

DEWEY E. COLEMAN,  
Respondent.

---

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

---

Respondent Dewey Coleman respectfully submits that the Court should not issue a writ of certiorari to review this case.

STATEMENT OF THE CASE

Petitioner's recitation of the facts and procedural history of this case does not give a fully balanced view of the record on which the Court of Appeals rendered its decision below.<sup>1</sup>

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<sup>1</sup>The disturbing facts of this case produced several sharply divided decisions from the Montana Supreme Court. See State v. Coleman, 605 P.2d 1000 (Mont. 1979) (affirming death sentence, one Justice dissenting); Coleman v. State, 633 P.2d 624 (Mont. 1981) (denying postconviction relief, two Justices dissenting); Coleman v. Risley, 663 P.2d 1154 (Mont. 1983) (denying habeas corpus relief, three Justices dissenting).

Respondent Dewey Coleman, a black man with no criminal record, and Robert Nank, a white man with a criminal record and a history of violence, were arrested in 1974 and charged with the kidnaping and murder of a young white woman named Peggy Harstad, near Forsyth in eastern Montana. At the time of the arrest Montana had a mandatory death sentence for the crime of aggravated kidnaping resulting in the death of the victim.

In early May 1975, Mr. Nank made a plea bargain, agreeing to plead guilty and to testify against Mr. Coleman in return for the state dropping the capital kidnaping count. Shortly thereafter, Mr. Coleman offered to plead guilty on the same terms, although he maintained his innocence. That offer was refused by the prosecution, for a variety of ostensible reasons, most of them focusing on Mr. Coleman's denial of participation in the crime. When the trial judge expressed an inclination to accept Mr. Coleman's offer, the prosecutor disqualified him from the case.

The case was then taken over by the Judge A. B. Martin, who eventually presided at trial. Shortly after Judge Martin entered the case, Mr. Coleman's then-counsel twice offered in open court to have Mr. Coleman plead guilty and admit guilt.<sup>2</sup> Each time the offer was refused by the prosecution. Counsel was then allowed to withdraw, new counsel was appointed, and the case went to trial.

At trial, the main evidence against Mr. Coleman was Robert Nank's testimony that he had initiated the crime and Coleman had helped him. Mr. Coleman denied any participation in the crime; he testified he was hitchhiking with Nank on the day in question, but that Nank had left him behind (because drivers would not stop

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<sup>2</sup>The offer was first made at a hearing at which Mr. Coleman was not present. In that hearing, defense counsel informed Judge Martin and the prosecution--falsely, we maintain--that a sodium amytal test had shown that "there was participation on his part in the crime." The offer was renewed the next day in Mr. Coleman's presence--but without any direct statement by defense counsel that Mr. Coleman had participated in the crime.



to pick up a black man) and later returned with the victim's car. The circumstantial evidence was at least equally consistent with Mr. Coleman's version of the events as it was with Mr. Nank's; but the all-white jury convicted Mr. Coleman of all three counts. On the kidnaping count, Judge Martin imposed the mandatory sentence of death by hanging.

On appeal, the Montana Supreme Court affirmed Mr. Coleman's conviction, but held that Montana's mandatory death penalty statute was unconstitutional and vacated his sentence of death. State v. Coleman, 597 P.2d 732 (Mont. 1978). The court remanded the case for resentencing, without directions.

Over Mr. Coleman's objection, Judge Martin decided to resentence him under Montana's new death penalty statute, which had been passed in 1977, three years after the crime and two years after the trial and first death sentence. That statute required the trial judge to sentence a defendant to death if one of seven enumerated aggravating circumstances existed and there were "no mitigating circumstances sufficiently substantial to call for leniency." RCM 1947 §95-2206.10 (Supp. 1977).

At the resentencing, a presentence report was prepared, but no new evidence was taken on the existence of mitigating circumstances. Instead, the trial judge used the evidence at trial to find mitigating circumstances absent, in a written order sentencing Mr. Coleman to death. The sentencing order was handed to counsel before either side presented any argument at the sentencing hearing. It gave no weight to any of a number of mitigating factors: Mr. Coleman's total lack of a criminal record at age 28; his honorable military service and his history of involvement in community service organizations; his emotional problems which had resulted in his hospitalization immediately before the crime; the lesser sentence given to Robert Nank despite his admitted participation and criminal record; and the

fact there was "practically no credible evidence connecting the defendant to the commission of the crime." State v. Coleman, 633 P.2d 624, 633 (Mont. 1981) (Morrison and Shea, JJ., dissenting).

On appeal, the Montana Supreme Court affirmed the new death sentence. Two state court petitions for postconviction relief were denied, without an evidentiary hearing. A petition for habeas corpus was similarly denied, on the Respondent's motion for summary judgment, by the United States District Court for the District of Montana.

That decision was affirmed by a panel of the Ninth Circuit, over a lengthy and strongly worded dissent. Coleman v. Risley, 839 F.2d 434 (9th Cir. 1988); Petition App. 74. Upon en banc review of that panel decision--in a opinion written by Judge Thompson, the author of the original panel majority opinion--the Court of Appeals reversed itself and unanimously<sup>3</sup> held Mr. Coleman's death sentence unconstitutional. Coleman v. Risley, 874 F.2d 434 (9th Cir. 1989); Petition App. 1. Its decision was limited to one of the several sentencing issues raised in the en banc petition; it held the others mooted by its order vacating Mr. Coleman's sentence of death. Petition App. 11.

#### REASONS FOR DENYING THE WRIT

- I. THE PETITIONERS HAVE SET FORTH NO GROUND UNDER RULE 17 TO JUSTIFY GRANTING THE PETITION FOR CERTIORARI.

Mr. Coleman's case is one of first impression; in all likelihood, it is a case of last impression as well. Mr. Coleman is the only person either side has identified who is directly affected by the holding of the Court of Appeals. His case is unique; it does not meet any of the grounds for granting a writ of certiorari set out in this Court's Rule 17.

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<sup>3</sup>Judge Alarcon dissented from the determination of the Court of Appeals majority that, in light of its disposition of the sentencing issue, Mr. Coleman's race discrimination claim did not have to be reached. Pet. App. 58. We assume that his silence on the due process issue itself indicates his agreement with the majority on that point.

For all the hypothetical protests of Petitioners and their Amici, they do not identify a single capital case treated like Mr. Coleman's. That is because no other state court has done what Montana did here: applied a new death penalty statute to a defendant already tried and sentenced under an unconstitutional statute after the sentence imposed under the unconstitutional statute was reversed. Every other state court to confront such a situation appears to have held such retroactive application of a new statute impermissible.<sup>4</sup>

Nor is it likely that a state court would allow a similar aberration of due process--writing the legal rules after the trial has ended--in a noncapital case. In years of argument on this issue, no one has found even one other case where that occurred. Probably because they were so obviously unfair--and a product of a legal era where the law was in flux and extremely difficult to decipher, Lockett v. Ohio, 438 U.S. 586, 602 (1978) --the procedures followed in Mr. Coleman's case are qui generis.

This Court's Rule 17 sets forth the considerations governing review on certiorari. This case meets none of its criteria. There is no conflict between federal courts of appeals; no other federal court has faced or is likely to face this question. There is no conflict with a state court of last resort<sup>5</sup>--except for the Montana Supreme Court in the instant case, of course, the kind of one-to-one conflict present in every grant of the federal habeas writ.

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<sup>4</sup>Notably, this includes the supreme courts of several of the states appearing here as Amici. See State v. Lindquist, 589 P.2d 101 (Id. 1979); People v. Harvey, 76 Cal.App.3d 441, 142 Cal.Rptr. 887 (1978); Meller v. State, 581 P.2d 3 (Nev. 1978); State v. Rodgers, 242 S.E.2d 215 (S.C. 1978); People v. Hill, 401 N.E.2d 517 (Ill. 1980); Commonwealth v. Story, 440 A.2d 488 (Pa. 1981). See also State v. Lee, 340 So.2d 474 (Fla. 1976); State v. Collins, 370 So.2d 533 (La. 1979).

<sup>5</sup>Amici mispeak themselves in their string citation of cases involving "aggravating circumstances arising subsequent to conviction." Brief of Amici 10. In every one of the cases they cite, the aggravating facts were all known prior to, and placed in evidence during, a sentencing or resentencing hearing.

As discussed below, we believe the decision of the en banc Court of Appeals was plainly correct. But even if it were not, because of the unique procedural history it addressed, it is a decision ill suited for review by this Court.

II. THE DECISION OF THE EN BANC COURT OF APPEALS IS A CORRECT AND STRAIGHTFORWARD APPLICATION OF LONG-ESTABLISHED PRINCIPLES OF DUE PROCESS.

The central, unanimous holding of the Court of Appeals attacked by the Petitioners here, was this:

The defendant is due at least that amount of process which enables him to put on a defense during trial knowing what effect such a strategy will have on the subsequent capital sentencing, the results of which may be equally if not more critical to the defendant than the conviction itself.

Petition App. 18. Petitioners never directly attack either that unexceptionable statement of the law, or its application to this case. They do not argue that Mr. Coleman had such knowledge; they do not deny the importance of such knowledge; and they do not say that deprivation of such knowledge should not violate the Due Process Clause's norms of procedural fairness.<sup>6</sup>

Instead, the Petitioners make three arguments: that the Court of Appeals analysis has "blurred the distinction between clauses of the Constitution" (Petition 12); that the due process principles underlying its decision constitute a "backward leap" which should be held nonretroactive "new" law under Teague v. Lane, 109 S. Ct. 1060 (1989) (Petition 13); and/or that any due process violation in this case should be held harmless (Petition 15). These arguments are both unimportant beyond the confines of this case and wrong.

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<sup>6</sup>Petitioners' Amici do take this tack, denigrating the interest of capital defendants in the "mere trial stratagems" of informed counsel. Brief of Amici 5. This Court's cases give more respect than Amici do to the role of defense counsel "consult[ing] with the defendant on important decisions ... in the course of the prosecution." Strickland v. Washington, 466 U.S. 668, 688 (1983).

A. The Court of Appeals Was Correct in Its Unanimous Decision That Due Process Forbids Resentencing on the Basis of Evidence Adduced at a Trial Held Under a Different Sentencing Statute.

Petitioners' main argument against the Court of Appeals' unanimous determination that Montana's application of its laws to this case violated the Due Process Clause, is that the state's actions did not violate the Ex Post Facto Clause.<sup>7</sup> Petition at 9-12. Plainly, this argument misses the Court of Appeals' point.

Mr. Coleman has consistently argued that his death sentence violated both clauses. However, in light of its disposition of this case on due process grounds, the Court of Appeals did not find it necessary to reach the much more difficult ex post facto issue. Petition, App. 13 n.7. Dobbert v. Florida, 432 U.S. 282 (1977) obviously would be the starting point for analyzing that issue. Mr. Dobbert, however, was both tried and sentenced under a constitutional statute. Unlike Mr. Coleman, Mr. Dobbert could not show any way in which the retroactive legislation made any substantial difference in his position, beyond providing a constitutional sentencing statute. That statute was in effect at all points in Mr. Dobbert's trial. The due process concern central to this case, therefore, played no part in Mr. Dobbert's, and the Court had no occasion to address it there.

The Ex Post Facto and the Due Process Clauses are not coextensive in all their applications. It is true that many actions with retroactive effects could be held to violate either provision. But that does not mean--as Petitioners assume--that

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<sup>7</sup>Petitioners' Amici take a similar approach, confounding two lines of due process decisions, to argue that the Ex Post Facto and Due Process Clauses must, in all their applications, be held coterminous. Brief of Amici Curiae at 6-8. There may or may not be merits to that argument when--as in the cases amici cite, a due process issue focuses on a change in the law after the time of the offense. But the argument makes no sense in reference to due process issues arising, like those here, changes in the law after the trial.



the converse is true, so that a retroactive action which does not violate the Ex Post Facto Clause can never violate the Due Process Clause. The exclusive focus of the Ex Post Facto Clause is on the moment "when the crime was consummated." Miller v. Florida, 482 U.S. 423, 430 (1987), quoting Weaver v. Graham, 450 U.S. 24, 30 (1981); see Calder v. Bull, 3 Dall. 386, 390 (1798). The Due Process Clause has a parallel application, where a retroactive judicial change in the law deprives an individual of "fair warning that his contemplated conduct constitutes a crime." Bouie v. Columbia, 378 U.S. 347, 355 (1964). But that is certainly not the only concern of the Due Process Clause, or even its principal one. In most of its applications, the Due Process Clause looks more to "the character of the procedure which leads to the imposition of sentence" than the legal availability of "a particular result of the sentencing process." Gardner v. Florida, 430 U.S. 349, 358 (1977).

Consider this hypothetical: After both the crime and the trial in a particular case, a state, faced with a federal determination that it is constitutionally insufficient to make a conviction for a particular crime turn on proof of facts A and B, enacts a new statute which requires proof of facts A, B, and C. The defendant in that case plainly cannot claim that the statutory change is ex post facto, because the change has increased the state's burden of proof. But that defendant certainly could complain, under the Due Process Clause, if a state appellate court upheld that conviction by finding that fact C had been proved at trial--although the defendant and his counsel were never told that fact C was in issue.

Of course, that is not really a hypothetical; it is essentially this case. It is also, with slight modification, Cole v. Arkansas, 333 U.S. 196 (1948) and Presnell v. Georgia, 439 U.S. 14 (1978). It is a factual scenario which is so



obviously and fundamentally unfair that every Justice in those two cases agreed that, if established, it would violate due process. The unanimous judgment of the Court of Appeals to the same effect says nothing about the Ex Post Facto Clause, and presents no controversy sufficient to call for this Court's resolution.

B. The Decision Below Presents No Retroactivity Question.

As is the fashion this year, Petitioners argue here for the first time that Mr. Coleman is seeking the application of a "new" constitutional rule under Teague v. Lane, 109 S.Ct. 1060 (1989), which they argue should not be "retroactive" and thus should not have been considered by the Court of Appeals below. Petition 15.

Petitioners never said that in the Court of Appeals, in argument or on rehearing, although the en banc decision below postdated Teague by over two months. This petition marks the first time at any level the State has pled, argued, or suggested that Mr. Coleman's claims could not be considered in a habeas corpus action. We do not think the State should be permitted to withhold this argument until it comes to this Court. See Moore v. Zant, 57 U.S.L.W. 4399 (U.S., March 29, 1989) (dissenting opinion of Justice Blackmun). If there were a legitimate claim of nonretroactivity here, it could and should have been presented to the courts below.

But there is no real question of retroactivity in this case. Petitioners' effort to manufacture one strains credulity: its explicit argument is that Bouie v. City of Columbia, 378 U.S. 347 (1964)--decided some sixteen years before Mr. Coleman's sentence became final--should not be applied "retroactively" here. Petition 13, 14. Petitioners' complaint in this regard is confusing: its concern appears to be not that Bouie is too new, but that it is too old, so that its application to this case constitutes "an unwarranted backward leap...." Petition 14.

The due process principles that govern the Court of Appeals' decision are actually much older than Bowie. In 1948, Justice Black wrote this for a unanimous Court:

No principle of procedural due process is more clearly established than that notice of the specific charge, and the chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state and federal.

Cole v. Arkansas, 333 U.S. at 199. The unanimous judgment of the Court of Appeals was that the disposition of this case was "dictated by" this "[u]nderlying ... principle ...." Penry v. Lynaugh, 57 U.S.L.W. 4958, 4961, 4962 (1989), quoting Teague v. Lane, 109 S. Ct. at 1090 (original emphasis):

Coleman was given no notice whatsoever of the life and death consequences of his actions in defending himself against the State's prosecution before and during trial. A defendant's right to notice and to fair warning of the conduct that impacts upon his liberty is a basic principle long recognized by the Supreme Court. Cf. Bowie v. City of Columbia, 378 U.S. 347, 350-51 (1964); In re Oliver, 333 U.S. 257, 273 (1948). Because Coleman had no reason to suspect that his decisions at trial would come back to haunt him at a sentencing hearing, we must conclude that he was denied due process when he was resented to death under Montana's revised death penalty statute.

Petition App. 18.

Petitioners' argument would reduce Teague to an absurdity: a declaration that every application of the law to a novel situation constitutes a "new rule" which cannot be applied "retroactively" to the only set of facts it will ever fit. Surely, Teague does not forbid federal habeas courts from returning in this manner to bedrock due process principles,<sup>8</sup> in assessing the constitutionality of aberrant state proceedings, like those in this case.

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<sup>8</sup>The fundamental nature of the due process principles applied here provides another reason Teague would not prohibit their application here, even if they could be called "new": Teague exempts from its rule of nonretroactivity the "bedrock procedural elements" of a fair trial, "the kind of absolute prerequisite to fundamental fairness that is 'implicit in the concept of ordered liberty.'" 109 S.Ct. at 1076-77.

C. The Court of Appeals Correctly Found the Constitutional Error in Mr. Coleman's Case Could Not Be Found Harmless Beyond a Reasonable Doubt.

There was some disagreement among the judges of the Court of Appeals on the issue of whether the constitutional error they all found was harmless. Eight of the ten judges found that "the due process error here is not subject to harmless error analysis." Petition App. 21. Judge Trott apparently believed harmless error analysis could apply; but he was convinced that the record made "it virtually certain in my judgment that the error cannot be said to have been harmless beyond a reasonable doubt." Petition App. 57. Judge Wallace disagreed, arguing that "the record, in its present state, cannot yield an answer to the harmless error inquiry." Petition App. 29.

Though nominally adopting Judge Wallace's position, the thrust of Petitioners' argument is directly contrary to it: Petitioners' claim is that the record shows that the error, admitted arguendo, was harmless. Petition 15-17. It is not usually this Court's practice to spend its time making fact-bound harmless error determinations, Ross v. Clark, 478 U.S. 570, 583 (1986); much less is a claim of error in such a determination by a lower court a ground for granting certiorari. But even if it were, there was no error here in this regard. There is ample evidence of prejudice in the present record. Petitioners' contrary claim that there is none cannot be squared with the record, and was rejected by every judge below.<sup>9</sup>

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<sup>9</sup>Petitioners' argument focuses solely on the Court of Appeals' three examples of the most obvious decisions affected by Mr. Coleman's counsel's ignorance of the legal implications of his actions at trial, forgetting that they were just that: examples. It also misrepresents the record.

Petitioners dismiss the idea that Mr. Coleman might have disqualified the trial judge, had he known he was the sentencer, telling this Court there is no "reflection of bias against Coleman in the record." Pet. 17. The Court of Appeals knew better: Judge Martin's apparent racial bias, exemplified by his reference to the 28-year-old Mr. Coleman as "this black boy", has been a major issue throughout this case. See Pet. App. 108-9, 182-3. (continued)

The broader legal question of the amenability of this kind of error to a harmlessness evaluation was resolved in Judge Thompson's majority opinion by a faithful application of this Court's well-developed jurisprudence in this area. The majority recognized that harmless error analysis can apply to capital cases, after Satterwhite v. Texas, 108 S.Ct. 1792 (1988). Petition App. 19. It acknowledged "that the 'errors to which Chapman does not apply ... are the exception and not the rule.' Rose v. Clark, 478 U.S. 570, 578 (1986)." Petition App. 20. It then carefully considered whether this was the kind of error that could ever be determined, beyond a reasonable doubt, to be harmless, or whether the error was so pervasive that the inquiry would be "'purely speculative'". Petition App. at 18-21, quoting Satterwhite v. Texas, 108 S.Ct. at 1797.

After a detailed examination of the impact of the change in Montana law on Mr. Coleman's defense (Petition App. 15-17), the Court of Appeals majority found that a harmless error determination in this case would require such pure speculation.

5 (cont.)

Petitioners' contention that the trial judge gave no crucial weight to the evidence of the uncharged "Roundup burglary", unknowingly interjected into the trial by defense counsel, is based on a partial quote from the trial judge's decision, taken out of context. That quote is inconsistent with the trial judge's written findings which show that it was this evidence which made the crucial difference in denying Mr. Coleman credit in mitigation. This is what the written findings said:

The only other criminal act which appears in the trial record in this cause is the aggravated burglary of a home in Roundup, Montana, where certain guns were stolen by the defendant and Robert Nank on July 4, 1974. By reason of the foregoing, the credit in mitigation allowed by Sections 95-2206.9(1) is not appropriate to this defendant.

Pet. App. 329-30 (emphasis added).

Petitioners' simplistic suggestion as to how the question "[w]hether Coleman would have testified may be analyzed from the record", Petition at 17, shows no appreciation of the complex considerations that go into that crucial trial decision in a capital case. As Judge Trott wrote in his concurring opinion, "[a]nyone familiar with death penalty cases knows the issues confronting defense counsel highlighted by Judge Thompson are real. This is not a matter of speculation." Pet. App. 57.

Coleman's counsel made countless tactical decisions at trial aimed solely at obtaining Coleman's acquittal, without even a hint that evidence in the record would be considered as either mitigating or aggravating factors. This due process violation had a pervasive effect on the composition of the trial record. As we have already observed, Coleman's counsel might not have called his client to testify under the new statute. He might not have brought in evidence of Coleman's prior criminal activity in his cross-examination of Nank. He might have challenged the trial judge. It would be fruitless in this case to require trial counsel to provide a record of how he or she would have handled the case differently. The error is such that no additional evidence is needed to demonstrate that the error "pervade[s] the entire proceeding." [*Satterwhite v. Texas*, 108 S. Ct. at 1797] .... We will not affirm Coleman's death sentence by speculating that his defense counsel might have made the same pretrial and trial decisions regardless of the sentencing scheme.

Petition App. 21.

A consideration of the mechanics of Judge Wallace's theoretically reasonable counterproposal of a remand and an evidentiary hearing, we believe, demonstrates the wisdom of the majority's decision. What would be the State's burden at such an evidentiary hearing? With respect to every tactical decision made at trial, the State would have to prove beyond a reasonable doubt that Mr. Coleman's counsel would not have done anything differently had he known that Mr. Coleman would be sentenced under a discretionary statute. Trial counsel is still alive, and could be called; but what testimony could he give? In all likelihood on most points, he and Mr. Coleman--like any defendant or defense lawyer in a similar situation--could only theorize whether they might have done things differently. To show anything beyond a reasonable doubt from such counterfactual speculation is impossible. And that speculation would potentially apply to nearly every decision made<sup>10</sup>--or not made, because there were no countervailing sentencing considerations to weigh--throughout the trial and pretrial proceedings in the case.

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<sup>10</sup>One point on which there would be little need for speculation was defense counsel's introduction of the Roundup burglary evidence. It was this point that convinced Judge Trott --who said he otherwise might agree with Judge Wallace--that it is "virtually certain ... the error cannot be said to have been harmless beyond a reasonable doubt." Pet. App. 57.



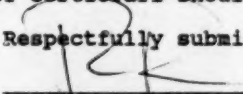
It is for this reason we believe the majority below was right, and this case is a perfect example of those exceptional situations where harmless error analysis is not possible. The pervasiveness of the impact of the error here places it in a class with the situations where this Court has found harmless error analysis most clearly useless: total denial of counsel, Gideon v. Wainwright, 372 U.S. 335 (1963); denial of the right to self-representation, Faretta v. California, 422 U.S. 806 (1975); or conflicts of interest in defense representation, Holloway v. Arkansas, 435 U.S. 475 (1978).

But right or wrong, the Court of Appeals' analysis of this issue was sound, and opened no new territory in this well-surveyed area of harmless error jurisprudence. The precise question it answered is unlikely to be raised again, as the constitutional error to which it applies will probably never recur. There is no good reason to grant certiorari to reexamine this question.<sup>11</sup>

#### CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

  
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ATTORNEYS FOR RESPONDENT

September 29, 1989.

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<sup>11</sup>Citing Judge Alarcon's separate opinion, Petitioners make a final argument that the Court of Appeals' directions for disposition of the case on remand were unclear or erroneous. Petition 19-20. They do not even make a pretext of an argument that this aspect of the decision below presents an issue worthy of review under Rule 17. If Petitioners' had questions about the basis for, or nature of, the Court of Appeals' remand order, those should have been raised in that court in a motion for reconsideration or clarification; it is not a matter which, by any test, warrants this Court's time and attention.